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AN HISTORICAL COMPARISON BETWEEN THE SOUTHERN SECESSION MOVEMENT OF 1860 AND THE SOVIET SECESSION MOVEMENTS OF TODAY

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ABSTRACT

This thesis uses an historical interpretation of the Southern secession movement of 1860 in order to formulate a secession theory consisting of three separate elements: 1) the growth of political faction; 2) a characteristic of the factional clash which renders the resulting crisis particularly unsuitable for constitutional or governmental adjudication; and 3) the existence of a subordinate governmental infrastructure, controlled by the minority faction, which can be used to effect a secession movement. An historical review of the Southern secession movement is undertaken in light of the above secession theory in order to argue for the theory's validity; then, the theory is applied to the various Soviet secession movements with a view towards proposing U.S. policy options.

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I. THE USE OF REASONING BY HISTORICAL ANALOGY FOR STRATEGIC PLANNING

Strategic planning, in its most basic sense, can be defined as applying processed data to a given model of the external environment to predict the outcomes of a certain process; for the most part, this prediction is required to give a baseline from which a program can be designed to influence the final outcome of the process into an output which is more favorable to the national interest of the United States. Or, put more succinctly, the process of strategic planning involves first an epistemological process; secondly, it involves a methodological consideration; that is, the construction of an appropriate frame of reference (or model) into which the processed data can be introduced and against which the processed data analyzed. Oftentimes, the outcome of the analysis will depend upon what epistemological and methodological option the analysis chose to arrive at his final prediction.

A. TWO CATEGORIES OF METHODOLOGIES AVAILABLE TO STRATEGIC PLANNERS

Let us consider the choice of methodological options faced by the planner. For the purposes of simplicity, let us divide the choice of methodology into two broad categories; the first option available can be defined as the use of indicator variables to predict the value of secondary variables; this option is characterized by the use of variables which lend themselves to quantification. The second option available can be defined loosely as the analysis of phenomena with an eye, not towards quantification, but towards an understanding of the fundamental motivations of the actors who gave rise to those phenomena. This understanding, in turn, is used to make a prediction as to how contemporary events, and policies to deal with them, can be related to events which have occurred before. Into the former category fall such methodologies as trend extrapolation, regression analysis, and monitoring of leading indicators. Other more

sophisticated methodologies utilize the process of quantification of variables as inputs to artificially constructed environments. These include scenario building, simulations, and modeling. All of these methods, though varying in the degree of analysis, have one thing in common: they used quantified variable in an attempt to predict, given a certain value of input, what the value of the output will be. Into the latter category fall such methods as "genius" forecasting, the Delphi technique, and the use of historical analogies.

B. THE STRENGTHS AND WEAKNESSES OF THE QUANTIFICATION METHODOLOGIES

A quick examination of the relative strengths and weaknesses of these two types of methods shows that, while both have utility, both are subjected to pitfalls which can undermine the validity of the analyst's output.[1] The main strength of the quantification approach is that it gives *answers*. Though those answers may be couched in the obfuscating language of probability and statistics, the answers are there. The planner who uses regression analysis obtains a curve generated by a computer which gives the best fit among various data points. A concrete number is generated reflecting the dependability of one variable on another. These methods of quantification, therefore, are seen as highly useful because strategic planning, for the most part, demands answers. Policies must be made. The national interest of the country must be met; situations faced by decision-makers unfold in real time, often without the luxury of prolonged periods of calm in which plans can be thought out. The ability to produce an *answer*, in real time, using state of the art computer technology supplemented by expert construction of computer models and simulations, can be very comforting to the decision-maker. If the analysis of the variables' quantification is done correctly, and the model into which those variables are input adequately reflects reality, the output of this process can be, in addition to comforting, extremely useful.

The problem with this type of analysis takes on a two-fold dimension: 1) it is not intuitive; that is, a human being does not reason using the binary process of the computer; therefore, accurate quantification of all important variables is extremely difficult; and 2) the prerequisite mentioned above concerning the construction of realistic models is far too often not met. The first dimension of this problem can be traced back to the philosophical predilections of the Enlightenment, where the rationality of science and the omnipotence of reason were deemed applicable to all forms of human endeavor; in other words, all could be reduced to science. This philosophy was expressed by the Marquis de Condorcet, who said in 1790: "Human and physical events are equally susceptible to being calculated, and all that is necessary to reduce the whole of nature to laws similar to those which Newton discovered with the aid of calculus is to have a sufficient number of observations and mathematics that is complicated enough."[2] The Enlightenment was a tremendous force in wester civilization, but there remained some stubborn resistance to this attitude of extending the jurisdiction of science into areas from which if had heretofore been excluded was lyrically and accurately described by the American writer Edgar Allen Poe who said in his story "The Mystery of Marie Roget":

> There are few persons ... who have not occasionally been startled into a vague yet thrilling half-credence in the supernatural, by coincidences of so seemingly marvelous a character that, as mere coincidences, the intellect has been unable to receive them. Such sentiments ... are seldom thoroughly stifled unless by reference to the doctrine of chance, or, as it is commonly termed, the Calculus of Probabilities. Now this Calculus is, in its essence, purely mathematical; and thus we have the anomaly of the most rigidly exact in science applied to the shadow and spirituality of the most intangible in speculation.

Poe, in his unique style, expressed the intuitive distrust of an approach that claims it can quantify *everything* (or, less rigidly, claims that only the quantifyable variables are important to the analytic process). We as thinking individuals intuitively feel that there are factors in an analysis whose importance is not diminished simply because they do not lend themselves to easy quantification.

Thus, the first dimension of the problem of the quantification approach leads directly to the second: the inability to construct realistic models and to accurately quantify all important variables. There is a paradoxical situation at work in the model construction process. A model, in order to be useful must accurately reflect reality. In order to accurately reflect reality, the model must be made very complex, taking into account all important variables. However, an overly-complex model does not lend itself well to use by the analyst; therefore, the analyst must decide to drop certain variables from his model in order to render it less complex and, in turn, usable.[3] Thus, the dual requirements of usability and accuracy work at cross purposes; the former demands that the model be simplified; the latter demands that it be made more complex. The end result of this paradox is that no usable model can accurately reflect reality; simultaneously, any model that accurately reflects reality is too complex to use. The best an analyst can hope for is that his computer model has struck a balance between usability and accuracy. In striking this balance, the second dimension of the problem with quantification methods is manifested: the difficulty in constructing good models.

If the methodologies emphasizing the quantification of variables suffers because it is non-intuitive, then they are given added credence because of their appeal to science. The seeds of the philosophy of the Enlightenment did not fall completely on barren ground; its emphasis on the scientific method in problem-solving took root firmly in conscience; in other words, just because we as humans have the intuitive feelings described by Poe above, we do not reject the notion that science and reason can play no part in our deliberations. The physical laws of nature, and the resulting predictability of the world in which we live, serve as a great psychological comfort (these laws, of course, have been shown to be only relative; however, this has not diminished their importance). It is only natural that we seek to find the same order that exists in nature in all areas of human endeavor. In this respect, the scientific analysis of policy science exemplified by the quantification approach enjoys its greatest popularity; the notion that, if we can just obtain the

right variable, or the right combination of variables, the door to the understanding of previously unknown social/political phenomenon will be unlocked, is very alluring.

C. THE PREDILECTION FOR THE USE OF REASONING BY HISTORICAL ANALOGY

The second family of methodological options, the ones that emphasize the intuitive understanding of personalities and events at the expense of more scientifically rigorous methods of analysis, are themselves subject to pitfalls which render their usefulness compromised. Before getting into these weaknesses, however, let us first examine what makes these methodologies so popular. In this discussion, the focus will be on reasoning by historical analysis, for no other reason than this is the method employed in this thesis. The below analysis could, with a few exceptions, be used to explain the other types of analysis that do not make use of the quantification approach. However, as mentioned above, the historical analogy approach will be this next section's main focus.

What makes the use of historical analogy so popular with planners and decision-makers? First and foremost, it is because the use of historical analogy to confront a present problem is analogous to the very process by which humans learn. The learning process, though little specifically seems to be known about its actual mechanics, is a process which employs stimuli and memory; in other words, a stimulus acts upon the brain, and the stimulus is transformed into a memory. This memory does not exist exclusively unto itself, but becomes blended with other memories, and this blending, taken *in toto*, forms the foundation of knowledge; in other words, the stimulus that evokes a new memory also affects the other stored memories, so that the entire memory bank is affected.[4] A similar situation exists when a problem is suddenly thrust upon someone for a decision; the stimulus drives the brain to remember past lessons, past experiences, as a baseline from which this new stimulus can be dealt. It is only natural that, when faced with a new planning problem, one searches for an analogy from the past with which to compare it.

This process is intuitive, as opposed to a process which adheres to some scientific method. Thus, historical analogy is popular because it parallels the human learning process.

There is another reason why reasoning by historical analogy might be popular with American planners. This factor is the importance the nation's legal system places on the reliance upon historical precedent to form what is known as the "common law." Though there exist no studies proving this link between predilection for reasoning by historical analogy and the nature of a country's legal system, it only stands to reason that, especially if the planner is a trained lawyer, the propensity, so deeply ingrained in our legal culture, to search for historical justifications for jurisprudential decisions might affect his epistemological processes. However, this possibility is advanced simply as a hypothesis in this thesis; due to the scope of the thesis' topic, no proof of this hypothesis is offered here. However, it would make an interesting study.[5]

D. THE EFFECTIVE USE OF REASONING BY HISTORICAL ANALOGY

Taking the above argument at face value (*viz.*, that a planner in the United States is driven towards the use of historical analogy by, among other things, epistemological considerations and, perhaps, the American legal culture), the question must be asked: is this necessarily bad? The answer to this question is, like the answer to many things, it can be if it is abused. Let us now examine the correct way that reasoning by historical analogy can be used by the planner to supplement the quantification approach and to gain new insight into problems afforded by a method which does not adhere to such a strict scientific method.

Any use of historical analogy as a baseline from which new policies and programs are developed must avoid the use of historical cliches in the reasoning process. No useful history is gleaned from the canned versions of history that sacrifice the truth for simplicity, or reality for cultural conditioning. Any generalization, any stereotypical explanation, must be investigated fully if the episode is to be used for policy planning. Therefore, taking as an example the topic of this thesis, a look at the origin of the American South's secession movement must probe deeply

beyond the immediate problem of slavery in the territories of the United States and look closely at what gave the southerners their philosophical justification for secession. The seeds of the secession movement, as this thesis will argue, were planted well before the Congressional debate concerning the expansion of slavery into the Southwest; they were planted and nourished and grew to fruition in the very soil in which was found the philosophical justification of the American Revolution. This is not to over-glamorize the South's treasonous actions during the winter of 1860-1861; however, this concept of states rights, coupled with the tremendous moral injustice of African slavery and the effect that moral outrage had on inflaming sectional passions, must be placed in the context of a secession theory if any useful historical reasoning is to be done; however, if the incident is to be used for historical analogy, then the background factors, though muted by the inflammatory rhetoric of the day, must be examined. The historical cliches about the period have no use in the formulation of today's policies; however, the underlying factors which gave southerners the philosophical rationale for revolt and the factors which removed the slavery controversy from the framework of Constitutional adjudication do.

Once the hurdle of historical cliches is overcome, the next hurdle, narrowness of focus, must be avoided. The analyst must not restrict himself so narrowly to the "what" that he fails to answer the "why." This is especially important when the spatial and temporal domains of the study are extensive. Thus, a detailed examination of the events of 1848-1860, with the purpose of comparing them to the events in another country over a century later, will yield little useful planning information; the history will be interesting, but it will not meet the need to produce a useful planning document. However, if one can discern the motivations of the actors of both periods, a comparison on this point will yield a useful result. If a similarity exists between them, then a policy that relies heavily on the historical analogy between them could pay dividends. On the other hand, if little or no similarity exists between the motivations and philosophies of the actors of the two periods, then another useful output will have been obtained. The usefulness of this output is more subtle; it will prevent the policy maker from a reliance on the use of historical

analogy, a reliance that this introduction argues is natural for one to accept. Again using the subject of this paper as an example, if the output of this paper allows a policy-maker to reject the contention that "Gorbachev in 1990 is just like Lincoln in 1860" and we therefore have no right to oppose a forceful Soviet crackdown against their various secession movements, then it will have served a useful purpose.

E. PITFALLS TO BE AVOIDED WHEN REASONING BY HISTORICAL ANALOGY

Any discussion of the use of historical analogy for policy planning would be remiss if it did not include a reference to the book *Thinking in Time, The Uses of History for the Decision Maker*, by Richard Neustadt and Ernest R. May (The Free Press, New York, N.Y., 1986). In this book, the authors hold that the *correct* use of history can be useful in the formulation of policy planning. With this basis in mind, the authors then detail several instances where history was misused to the political detriment of the president or the strategic detriment of the nation. What this book calls for is a deep understanding of the historical analogy before letting it color the policy-maker's decision making process. The only correct use of the thesis which follows here is to produce a deeper understanding of the parallels and dissimilarities between the U.S. secession crisis of 1860-1861 and the future Soviet secession crisis. Those who look to it for a comprehensive history of the American secession movement will be disappointed. Those who look to it as an answer to the casual comment that, because of the Civil War, the United States has no right to condemn the Soviet leadership for a bloody suppression of an independence movement, will find some points in it that will put that assertion to rest. Those who look to it to predict the future of the Soviet secession movement will find some parallels in reasoning and motivation of the two movements which may facilitate predictions.

The requirements for the correct use of history discussed by Neustadt and May contain two major drawbacks. The first drawback is the element of time. Most situations which call for policy planning do not come with the luxury of unlimited time; the requirements for studying the

historical analogies raised and the historical assumptions made often cannot be satisfactorily met due to the constraints of time. The Korean decision of Harry Truman, mentioned as a case study in Neustadt's book, is a prime example. The president had a limited amount of time to act before South Korea had been entirely overrun. Even if the decision had been made in a vacuum, with no other political or military considerations to be concerned about; and even if the pace of the deliberations concerning the crisis was slow and unhurried, the amount of time Truman had to make the decision would not have led to the complete historical analogy approach called for. There simply was not enough time to effect a historical analogy approach to the problem. This seems to indicate that the approach utilizing a historical analogy is suitable only in problems which present a long lead-time. Fortunately, the question explored in this thesis, the probability of Soviet secession, has presented the requisite lead time in order to consider the question using this reasoning by historical analogy approach.

The second drawback of the historical analogy approach is more fundamental, in that it is not the function of a simple variable such as time. This drawback arises out of the difficulty of obtaining a good, consistent historical interpretation of an event; this difficulty is not the same as the use of historical cliches mentioned above; it is the result of the fact that historical events do not lend themselves easily to interpretation; two different authors, studying the same historical event with the same sources, may arrive at two separate conclusions as to the actual cause or meaning of that same event. The problem then becomes: which version of history should the analyst believe? There is no easy answer to this problem; the analyst who does a historical analysis can only present his interpretation of history as honestly and as accurately as possible.

Even with these two inherent drawbacks, the use of historical analogy, drawing as it does from the mine of the past, a mine whose veins are full of the experiences of past generations and the lessons they contain, remains a powerful tool for the analyst. Used with skill and care, used with full knowledge of its inherent limits and potential pitfalls, reasoning by historical analogy

can lead to insights that cannot be gleaned from methodologies which rely exclusively on strict quantification.

F. CONCLUSION

The purpose of this thesis is to use this historical method of analysis discussed above with the hope of discovering parallels between the South of 1850-1860 and the Soviet Union today. The history of the United States during this critical period can be likened to a field which has been harvested time and time again by historians in the search to answer some questions of the nature and future of our own country. However, the answers to those questions comprise only one corner of that field; today, with the renewed strength of democracy, and with revolutions threatening established governments throughout the world, the questions of prelude to civil war take on a profound international importance. Therefore, that field now contains lessons which can be used to answer questions for foreign policy planners of today. This thesis attempts to bring in a small portion of this new harvest.

CHAPTER I ENDNOTES

1. Quade, E.S., *Analysis for Public Decision*, Elsevier Press, New York, N.Y., 1975.

2. The Marquis de Condorcet was one of the *philosophes* of the Enlightenment. His association with, and influence on, Thomas Jefferson is catalogued in Malone, Dumas, *Jefferson and the Rights of Man*, Little, Brown, and Company, Boston, MA, 1951. Malone characterized the marquis as "...the (one of the *philosophes* who) was the closest to him (Jefferson) in spirit and temperament."

3. Deutsch, Karl, *Nerves of Government*, The Free Press, New York, N.Y., 1960.

4. Pierce, Charles, "How to Make Our Ideas Clear," in White, Morton, *The Age of Analysis*, vol. 6, George Brazillien, Inc., New York, N.Y., 1958, pp. 143-153.

5. As mentioned in the text of the chapter, this assertation that the legal culture of the United States may affect the propensity for planners to use the method of historical analogy is advanced merely as a hypothesis, and, due to the scope of the thesis, no proof of this assertation is offered. However, it is interesting to speculate on this possible link between legal culture and epistemological process. Early in our nation's history, we rejected a legal system which was based on any rigid code; while the majority of the state criminal codes are based on formal codified law, the rest of the legal system took its cue, not from any famous European or Roman code, but from the English common law. (Some states still have what are known as "common law" crimes; that is, crimes for which no statute exists. However, most states, and federal law, require, require a law passed by a legislature proscribing a certain act before the act is considered indictable. See Berman, Harold J., *The Nature and Function of Law*, The Foundation Press, Mineola, N.Y., 1980, p. 125.) In Henry W. Ehrmann's *Comparative Legal Cultures*, (Prentice-Hall, Inc., Englewood, N.J., 1976), the author draws the distinction between the Romano-Germanic family of civil law and the family of common law. Whereas France had the Napoleonic Code, Germany had the Code of 1900, and Switzerland had its Swiss Code of 1907, the United States, not surprisingly, adopted the English system of common law. That the varying system of laws developed as a function of nationality is interestingly shown by the fact that in Quebec and in the state of Louisiana, both heavily influenced by French culture, a remnant of the old French Code still exists in their system of civil law. The English system of common law, adopted by the United States, relied almost exclusively on a historical memory of past judicial precedents. Ehrman calls the need to rely upon this historically based system of precedents "the keystone to the viability of the common law." What we regard as the bedrock of our legal system, the adherence to precedent in the common law, countries which have developed legislative codes in place of common law regard as, in Ehrman's words, "an archaic legacy which will give way sooner or later to more modern ways of shaping the legal system of a nation." Thus, the United States and other former commonwealths of England, and England herself, are unique as regards their legal propensity for historical reasoning. This propensity exists to this day in the United States. For example, the Uniform Commercial Code (UCC) was developed for facilitate and standardize the creation and enforcement of contracts; yet even that incredibly extensive code recognized that many questions would

arise that could not be covered in the code. In that case, the common law of the applicable state was to apply (Uniform Commercial Code §1-103: "The principles of law and equity apply ... unless displaced by this Act....). Thus, the legal system, even in a move to codify some aspects of law, still recognizes the existence and importance of the common law. This unique legal jurisprudence gives the United States a great cultural propensity to look for historical precedents and analogies with which to face new problems; in *Curbing the Courts, The Constitution and the Limits of Judicial Power*, Gary L. McDowell makes the point that, even in the most crass examples of judicial "legislation," the offending judges almost always attempt to relate their action to past precedent; this is not done our of any judicial scruple of the particular judge, but rather out of the instinctive feeling that this is the only way new Constitutional pronouncements will be accepted. The author sees a developing tendency to divorce the judicial process from past precedents, relying solely on a theory which "follows (a) progressive instinct for what is fair, decent, and humane, regardless of ... judicial precedent," as being extremely dangerous to the legitimacy of the federal courts. This propensity to call on historical precedent immediately when confronted with a new strategic problem is probably heightened when the planner or decision-maker is a trained lawyer. An interesting exercise, not attempted in this paper, would be to see if, in cultures that did not emphasize a system of common law but rather a Civil Code, a similar propensity to rely on historical precedents exists. At any rate, reasoning by historical analogy is particularly suited to an analyst who works in a system which places such a high value and relies so heavily on principles of the common law.

II. THE PURPOSE OF THE THESIS

A. INTRODUCTION

Having devoted the first chapter of the thesis to the use of reasoning by historical analogy generally, let us now turn to the specific question at hand; *viz*, drawing parallels between the secession movement of the American South and the secession movements of the Soviet Baltic Republics. It will be the contention of this thesis that the two secession movements, occurring more than a century apart, share three distinct, identifiable characteristics; and it is within the framework of these three characteristics, taken together as a single theory of secession, that the two movements can be compared for policy planning purposes. By examining these three broad characteristics in light of the historical example of the South, one can then compare the various aspects of these characteristics with the present crisis of the Soviet Union; this must be done with one purpose in mind: which of the characteristics contain aspects which can be manipulated by U.S. policy planners today to control the evolution of the Soviet secessionist movement to the advantage of the United States?

B. THE SECESSION THEORY

The southern and Baltic movements share three common characteristics:

1) the presence of two factions divided over a policy question of sufficient gravity to precipitate a threat by the minority faction to leave the Union;

2) a particular aspect characteristic of the policy question which renders it particularly unsuitable for constitution/legal adjudication within the framework of the existing national government;

3) the minority faction being represented by a system in which a governmental infrastructure, separate from the national government, is already in place, able to effect quasi-legitimate, albeit extra-legal (in the national sense), declarations of independence and/or ordinances of secession.

All three characteristics of a secession movement described here are of equal importance; all three must be present before secession becomes a clear and present danger.

Before going on to a more detailed explanation of how the thesis deals with these three characteristics of a secession movement shared by the South and the Baltics, let me insert here another caveat on the purpose of this thesis. It is very easy, in the formulation of secession theories and the mechanics of historical comparisons, to lose sight of the objective for which the comparison was originally conceived. In other words, it is extremely easy to get lost in the history of this fascinating question, so much so that one runs the danger of letting the history become an end in itself. The in-depth historical background that goes into discussing the historical basis for the formulation of the above theory is, it must be remembered, just that: background. This thesis' *raison d'etre* is, from the very first page, *planning;* it is a document whose end purpose is to propose strategies, working from the assumption that the future of the Soviet Union is important to the national security of the United States, based in historical analogy which can be used actively to affect future events. The history is there merely to provide validity for the theory; in other words, the hierarchy of importance concerning the overall structure of the thesis is, in order of ascending importance: historical justification of the secession theory, the proposition of the theory, and, finally, the use of the theory as a present-day planning tool. With this parenthetical discussion of the purpose of this thesis complete, let us now turn toward a more in-depth discussion of 1) the secession theory, and 2) how it was used in this thesis to draw the historical analogy between the two secession movements.

C. AN IN-DEPTH EXAMINATION OF THE SECESSION THEORY - THE FIRST ELEMENT: THE RISE OF FACTION

The first element of the secession theory is the evolution of political faction. The founders of both nation's governments, the founding fathers and the Bolsheviks, realized the potential fratricidal conflict which would be engendered by the evolution of political factions. The

Americans, led by James Madison, had the tougher job; they had to decide how to reconcile this known effect of factions with the concepts of representative democracy. The easy expedient available to Lenin, the outright ban of factions within the government, was not available to them; they had to develop a theory all their own. Madison and his early political ally Alexander Hamilton struggled in the Federalist papers to explain how the growth of factions within the nascent democracy, far from threatening the existence of the government, would actually be a check against the tyranny of the majority. However, in the rise of factions in the United States, the first characteristic of the secession theory was met; with the recent allowance of factions in the Soviet Union and the Soviet's increased tolerance of dissent, the first element of the theory is met for the present day situation in the Baltics and other republics which are bordering on secession.

Thus, the thesis will explore the rise of factions in both countries with an eye toward providing the background information necessary to bolster the assertion that the factions in both cases were viable. The issue chosen to demonstrate the rise of factionalization in the American South was the rise of a states-rights philosophy to counter the nationalistic philosophy of the American federal government; the issue chosen in the Soviet case is the rise of a nationalistic faction of the Soviet government. The choice of both of these issues as the issues over which the factions divided could be open to question. The latter choice, concerning the Baltics, seems, at first glance, to be self-evident, requiring no further investigation. The choice of the former, southern states rights, seems to cloud the true issue of slavery as the divisive issue over which the United States divided. Let me speak first to the American concern; I chose the issue of states rights over slavery as the factionalization issue for three reasons: 1) the states rights issue was debated in a constitutional and legal framework; whereas debate on the slavery issue, though not lacking in constitutional and legal language, often degenerated into emotional and racist appeals to the perceived benefits of the peculiar institution. The analysis of the states rights argument was, therefore, able to be accomplished in a much more righteous manner than could have been the debate on the relative benefits of slavery that accrued to both the owner and the bondsman; 2)

the question of state sovereignty, and not the question of slavery, was ostensibly the issue over which the South left the Union. This is not to reduce the importance of the slavery question in the actual controversy; however, it does recognize the fact that the southerners felt the need for a legal justification of their action, and it was the theory of state sovereignty to which they turned to generate that legitimacy; and 3) finally, and most importantly, I feel the question of slavery is better examined, not in this section concerning factionalization, but in the following section regarding the second characteristic of the secession theory. This will be covered later in the introduction, as the rationale behind the secession theory is explored in greater depth; suffice it now to say that the question of slavery, though given short shrift in the factionalization section, is covered extensively in the latter section. For the three above-explained reasons, state sovereignty was chosen as the issue over which the factions which led to the American Civil War developed.

As mentioned above, the issue chosen for the factionalization of the Baltics seemed self-evident; that is, it seems redundant to state that factionalization between those wanting independence and those adhering to the national authority is that factionalization required by the secession theory for the generation of a successful secession movement. However, viewed as a break in a seventy year tradition of repressing political factions and their resulting political dissent, this presents an interesting inquiry if framed in the context, not of the existence of the faction *per se*, but in the allowance of political dissent. In other words, the story is not that the faction grew to existence, but that it was allowed to grow. Certainly, the potential for the development of a faction devoted to Baltic independence was as strong in 1945 as it is today. The analysis, therefore, of this first characteristic of the secession theory from the Soviet viewpoint is different from that of the American viewpoint. In the latter, it was the development of the faction that provided the analysis; in the former, it is the allowance of that development which arrests our attention. Thus, the "nationality problem" of the Baltics will be discussed, but the main focus

of the discussion will be the evolution from Lenin's ban on factions to Gorbachev's toleration of them.

This, then, is what the first and third sections of the thesis deal with: American and Soviet factionalization, respectively, in the context of the secession theory. Digressing here for a moment from the stated purpose of this section of the introduction (*i.e.*, a brief outline of how the thesis is arranged in the context of the secession theory), let me state here briefly that this analysis presents a policy planner with his first opportunity to affect the Soviet secession movement. The development (or, in this case, the allowance) of factions is the first step in a three step process which can lead to secession. If the United States decides that the political stability of the Soviet Union *status quo ante* 1990 is in the national interest of the United States, for any reason, then a policy should be tailored to retard the growth of political factionalization of the Soviet body politic. This policy, however, could come into conflict with the great Wilsonian principles of political freedom upon which this country relies so heavily to guide much of its foreign policy decision making. In other words, the rhetoric of democracy and pluralism is comforting; however, in this case, since democracy leads to factionalization and factionalization is one of the three prerequisites for a successful secession movement, if the United States decided that it was in its national interest that the Soviet Union remain politically stable, it must, contrary to all its stated principles, tailor its pronouncements and policies to the end of slowing the democratic evolution in Soviet politics. If, on the other hand, the fragmentation of the Soviet Union is deemed to be in our interest, then the contrary would be true. Our usual rhetoric concerning the spread of democracy would dovetail nicely with our desired policy goal (the disintegration of the Soviet Union). At any rate, leaving the digression and returning to the original path of the introduction, the first and third sections of the thesis detail the growth and allowance of factionalization in both secession cases.

D. THE STRUCTURE OF SECTION I (SOUTHERN FACTIONALIZATION) AND SECTION III (SOVIET FACTIONALIZATION)

Having given the basic rationale behind the two factionalization sections (sections one and three), let me now explain in a little more detail the substance of these sections. Section I of the thesis, as stated earlier, deals with the growth of the states rights faction in the American South; this section is divided into five chapters. The first chapter of the first section deals with John Locke and the philosophy of revolution. By no means do I assert that Locke was the only philosopher of consequence in the American experience; Hobbes, Rousseau, Milton, Montesquieu--all these men, and many others, added their important contributions to the American political psyche; Locke's philosophy, however, occupied an extremely important place in American political thought, and, as the justification of the American Revolution, it has no parallel. Thus, any study which attempts to uncover American philosophical justification for rebellion, whether they occurred in 1776 or 1860, must anchor his search on the philosophy of Locke.

The second chapter deals with American political writing before the Declaration of Independence. The available writing for this period is, of course, voluminous; the selections chosen in this paper represent the revolutionary point of view as it matured from the cool legal reasonings of a man like Richard Bland to the fiery revolutionary prose of a man like Thomas Paine. These selections are not designed to be an exhaustive study of pre-Revolutionary War American writing; rather, they were chosen to demonstrate the maturation process described above. How did American revolutionaries, who first demanded only "the rights of Englishmen," make the transition from rights within the Empire to independence without? This process reveals the revolutionary character of America's founding fathers, men only one or two generations removed from those who would lead the South. Did the characteristics of the Revolutionary founders, revealed in these writings, live on in the next generations? This chapter examines what these characteristics were.

The third chapter develops the foundation for the rationale of the construction of the federal government which occurred at the Constitutional Convention of 1787. This foundation was the political experience of the United States between the end of the Revolution and the adoption of the Constitution; *viz.*, government under the Articles of Confederation. Again, this chapter is not designed to be an exhaustive history of the period; it should be read as forming the basis for the nation/federal/state government debate that plagued the United States even after the adoption of the Constitution which was designed to remedy the problem of parallel sovereignty. The change between the Dickenson draft of the Articles and the Articles as they were eventually adopted (*viz.*, in Article 2) should be read as the most important part of this chapter, foreshadowing the philosophical debate which would give rise to the theories of John C. Calhoun and others who argued for greater state sovereignty.

The fourth chapter gets to the heart of the federal/state controversy faced by the framers of the Constitution in 1787. It traces the evolution of the concept that eventually grew into the supremacy clause of the U.S. Constitution from its introduction as part of the Randolph Plan in the first weeks of the Constitutional Convention to the final form in which it was included in the Constitution. This understanding of how this clause developed, and what the framers intended when they inserted it into the Constitution, and the battle between the framers over the true meaning of both the specific clause and the general concept of federal supremacy is indispensable in the understanding of the arguments of John C. Calhoun made in the following chapter. This chapter will show that, despite its seeming clarity and forcefulness, the supremacy clause, and the spirit of federal supremacy which it reflected, was inserted into a Constitution which was fraught with a dangerous ambiguity regarding this very concept. The issue of federal/state sovereignty was perhaps the most volatile political issue of the day. The ambiguity which resulted from its resolution in 1787 left an opening which John C. Calhoun and other southern political philosophers were quick to exploit in their search for an intellectual justification for rebellion.

The fifth chapter examines the nullification writings of John C. Calhoun, and his writings on his theories of both government in general and the United States Constitution in particular. This was the true intellectual justification for the secession crisis which was to follow a scant decade after Calhoun's death. Calhoun's theories are explored in the text of the chapter, and the reasoning of Jefferson and Madison on the same issue are discussed in the notes on the Virginia and Kentucky resolutions. In these resolutions, perhaps, Madison saw the unraveling of his carefully constructed theory of "sphere extension." At any rate, the ultimate reasoning of Calhoun closely paralleled that of the nation's third and fourth presidents.

This fifth chapter brings the first section of the thesis to a close. The first two chapters are important in that they examine the revolutionary character of the American founding generation, a generation not too far removed from their posterity which would lead the South out of the Union. Chapters three and four should be read in light of the framing of the question of state sovereignty; the Articles of Confederation, as examined in the third chapter, pointed out some material defects in this system of state sovereignty, defects which nationalists were quick to exploit in their desire to strengthen the national government. This strengthening process is traced by chapter four, the development of the supremacy clause in Philadelphia in 1787. The fifth chapter, a discussion of the philosophical musings of John C. Calhoun, should be read as providing the intellectual *sine qua non* of the southern secession movement. Thus, this section traces the rise of the American states rights faction.

Section three, the discussion of the Soviet factionalization and possible American responses to this phenomenon, is covered in chapter ten. In this chapter, the focus in on American policy responses available to the democratization phenomenon occurring in the Soviet Union. Assuming that the secession theory is correct, and factionalization of the body politic is one prerequisite for secession, then if the United States can effect the Soviet Union's democratization movement, it can accelerate or retard the growth of political factions in that country, thereby affecting the

probability and pace of secession. It can accomplish this, obviously, by the degree to which the United States encourages the nascent democratic movements in the Soviet Union. Chapter 10 argues, using the rubric of two taxonomies (of John Locke and Thomas Hobbes) that either path taken (the encouragement or discouragement of democracy) contains pitfalls which could sabotage the results of the United States' effort. Since this thesis is designed for policy analysis, this section, though ostensibly labeled a chapter on Soviet democratization, actually focuses narrowly on U.S. policy responses available in the face of growing Soviet factionalization. As mentioned earlier in this chapter, this policy analysis focus in the area in which this thesis will find its greatest utility. Though the analysis of Soviet factionalization would be interesting history, it is in the area of policy options that this and other chapters in the Soviet sections of this thesis mainly concern themselves.

To sum up the factionalization sections, sections one and three, the following matrix is presented:

TABLE I.

	UNITED STATES	USSR
1) The growth of political factions.	a) States rights i) Locke ii) Revolutionary spirit iii) Art. of Confed. iv) The development of the supremacy clause v) Writing of John C. Calhoun	a) The growth of faction in the Soviet Union and U.S. policy response.

One will note, parenthetically, that the section involving the growth of political factions in the U.S. is much longer than the section corresponding to Soviet factionalization. One will later note the same trend in the sections corresponding to the second element of the secession theory.

This seems to contradict the assertion made above that it is providing policy options for the Soviet case which is the function of this thesis. However, this is not the case. The sections which deal with the southern secession crisis are meant to prove the validity of the secession theory (at least to prove it with as much certainty as possible); therefore, it is only natural that they should be covered to a depth sufficient to achieve that goal. In other words, one can look on the sections covering the souther secession crisis as an attempted proof of a hypothesis; similarly, one can view the sections covering the Soviet secession crisis as the application of the hypothesis explored in the first two sections to the Soviet case. Therefore, the sections dealing with the southern secession movement much be covered in some depth, as these sections are the foundation for the theory. Once the theory is satisfactorily explained, then it can be applied to the contemporary situation in the Soviet Union.

Thus, the discussion of the first characteristic of the secession theory, the formation of faction, is covered in the first and third sections for the American case and the Soviet case, respectively. The stage is now set for a discussion of the second characteristic of the theory: the particular aspect of the factional dispute which renders it particularly unsuitable for constitutional/legal adjudication within the framework of the existing national government. Let us discuss the American case first.

E. THE SECOND ELEMENT OF THE SECESSION THEORY--A CHARACTERISTIC OF THE NATIONAL GOVERNMENT WHICH MAKES THAT GOVERNMENT PARTICULARLY UNSUITABLE FOR CONSTITUTIONAL/LEGAL ADJUDICATION OF THE CRISIS

In discussing this second characteristic of the secession theory as regards the American South in the nineteenth century, use will be made of a theory advanced by Gary L. McDowell in his book *Curbing in the Courts, The Constitution and the Limits of Judicial Power*. This book, in the chapter entitled "The Peculiar Security of a Written Constitution," advances the interesting theory that the true check on factionalism in a democracy is security of a written fundamental law. Using

the words of Alexander Hamilton and James Madison in the Federalist Papers, McDowell outlines the tendency for factions to grow in a republican democracy. Then comes his theory on the security of a written Constitution:

> By forcing deliberation on fundamentally divisive issues to be conducted within the context of constitutionally created institutions, ...by making the Constitution the rubric under which public discourse would be carried out, the natural concern (of different factions) for justice would be transmuted into a conventional concern for constitutionality ... for example, it is better that a law restricting some facet of business be debated as to whether it violates the Constitution's grant of power to Congress to regulate commerce as to whether such a restriction is abstractly right or wrong. (McDowell, *op. cit.*, p. 70)

This theory, advanced in a book dedicated only to jurisprudential arguments and containing not the slightest discussion of the American secession crisis, I believe, perfectly describes the reason why the United States was doomed to suffer through such a crisis and, ultimately, a Civil War.

The reason why the secession crisis occurred was this: McDowell's theory is correct in the context in which it is proposed; that is, two factions, each striving for the implementation of a public policy, argue their case in a constitutional context in both the Congress and the courts. This scenario envisions the factions disagreeing on the specifics of the policy and on the constitutionality of the policy. However, what if the controversy contains a moral dimension which does not lend itself to Constitutional adjudication? McDowell's theory sees the factions arguing over constitutionality and expediency, not morality. If the moral dimension is introduced into the factional conflict, and the constitutional rubric in which the contest is fought is not expansive enough to contain that dimension, then the factional crisis cannot be defused in the manner in which the Constitution is designed. In other words, our system of government is not set up to handle political discussions over issues which lend themselves to analysis as to whether they are, as McDowell says, "abstractly right or abstractly wrong." At no other time in its history was America presented with a political problem which lent itself so easily to questions of abstract morality as it was when it was presented with the question of slavery.

This problem was exacerbated in the context of slavery since the southerners who argued for their position had a legitimate Constitutional argument; indeed, they had a decision of the Supreme Court which legitimized their claims. That the narrowness of the Constitutional rubric and the subsequent failure of this process to address the moral, as opposed to Constitutional, aspect of the question led to frustration in the faction fighting slavery can be seen from its rhetoric; no greater example of this can be found than William Seward's speech in the United States Senate on the "higher law" doctrine. This sentiment, which held that a higher law than the Constitution existed, was the first blow to be struck against the Union; for if there was a law higher than the Constitution, what was the worth of the Union's fundamental law? This was the problem when factions were driven from the Constitutional context of political adjudication in their search for a solution which satisfied a political crisis with a moral dimension. The moral dimension of the slavery question rendered the existing Constitutional institutions of the day inadequate to the task of effecting a non-violent political resolution of the problem.

Another way of looking at this phenomenon is to imagine that most political issues in the United States, whether one refers to the nineteenth or twentieth century, raise questions which must be answered on two separate planes. First, the question must be answered legally; that is, in the program proposed or the course of action considered consistent with the Constitution and any other laws upon which the proposed action might possible trespass. Once the legal questions are answered, then the philosophical questions rise to the fore: is this course of action consistent with one's own political philosophy. Is it capable of effecting the desired result within the boundaries of that philosophy? Once these two questions are met and answered, the policy program can be proposed and fought for against another political faction who disagrees with you on one of the two above-mentioned dimensions of the problem: the legal dimension and the philosophical dimension. This two dimensional rubric is satisfactory for the vast majority of political questions which arise in the American political system.

Because most problems are resolved within these two dimensions, and due to our justifiably proud heritage in the area of democratic pluralism, one is especially tempted to apply the above rubric to all policy issues. However, a small minority of political issues cannot be confined within that rubric; those are the issues which contain a moral dimension. Yet, can one not see the utter frustration which one might feel if he were involved in a policy question with a clear moral dimension, a dimension yet excluded from the policy issue debate because a majority of the participants had satisfied themselves according to the two dimensional rubric described above? That was the case with the slavery question in the nineteenth century. A vast majority of Americans had satisfied themselves on the philosophical and legal planes, and for a while that seemed sufficient. But slavery was such a moral outrage, especially in light of our democratic institutions, that the dichotomy between slavery and freedom would not let the matter rest. Two major crises were averted in 1820 and 1850 by political compromise, but the political adjudication process could not contain the moral dimension of the question much longer. No clearer proof of this nation's inability to deal with moral issues, no clearer proof of the validity of the second characteristic of the secession theory, exists than the descent of the United States, a democratic republic blessed with natural resources beyond measure which had devised one of the most ingenious forms of government ever to guarantee personal liberty, into a fratricidal Civil War.

Thus, the second section of the paper deals with the second characteristic of the secession crisis as it applies to the American South; that is, it focuses on the impact that the moral aspect of slavery had on the ability of the Constitutional system of adjudicate the problem. This is done by looking at two separate political crises marked by rancorous factions divided over political questions of great import. The major difference between the two crises will be that one lacks a moral dimension, while the other, the slavery controversy, contains one. The fact that the first crisis could be successfully adjudicated while the other one could not will be used to demonstrate that it was indeed the morality of the slavery question which provided the necessary unsuitability for Constitutional adjudication described in the second characteristic of the secession theory.

The Soviet context of this second characteristic of the secession theory will be covered in section four. Here, as opposed to the American context, the morality of the contested issue is not the factor which removes the question of adjudication from the existing governmental system; it is, rather, in this case a question of the legitimacy of the Soviet government in its position as negotiator in the crisis. This section, therefore, will be comprised of a chapter which addresses this problem of Soviet legitimacy. Thus, the parallel drawn between the American and Soviet secession crisis regarding the second characteristic of the secession theory hinges on the differences of the two factors which fulfill the role of withdrawing the crisis from the possibility of Constitutional adjudication: the moral factor (in the American case) and the question of legitimacy (in the Soviet case).

F. THE USE OF THE SECOND ELEMENT OF THE SECESSION THEORY FOR POLICY PLANNING

Again, digressing for a moment from the outline of the thesis, let me remark here that, just as the first characteristic of the secession theory, the growth of factions, presented the United States with an area in which to make policy to affect the outcome of the crisis, so too does this second characteristic. If Soviet legitimacy in the Baltics is the factor which brings the second element of the secession theory into play, and if this element, as it is postulated, is indispensable in the success of a secession movement, then American policy directed at the legitimacy of the Soviet position in the Baltics can have a direct impact on the outcome of the crisis. If the United States were to recognize the independent government of one of the Baltic republics, for example, that would have a direct impact on the legitimacy of the Soviet position in the crisis, and it would accelerate the crisis by undermining the legitimacy of the Soviet government to adjudicate the crisis. If, on the other hand, the United States tailored its policy toward bolstering the legitimacy of the Soviet position in the Baltics, then this would act to defuse the second element of the secession theory, and secession may become less likely. Again, the United States will be faced

with the same dilemma it faced regarding the first element of the theory; that is, if the stability of the Soviet Union is deemed to be in our national interest, then U.S. policy, in refusing to recognize the Baltics' attempt at independence, will be at odds with our historical tendency to promote freedom and democracy, and to condemn the legitimacy of governments imposed upon nations without the consent of the governed. A discussion of this paradox will be contained in chapter eleven.

G. THE THIRD ELEMENT OF THE SECESSION THEORY - A PRE-EXISTING SUBORDINATE GOVERNMENTAL INFRASTRUCTURE AVAILABLE TO CARRY OUT A SECESSION MOVEMENT

Thus, repeating the broad outline of the thesis: the first element of the secession theory is covered in section one, chapters one through five (in the American context) and section three, chapter ten (in the Soviet context). The second element of the secession theory is covered in section two, chapters one and two (in the American context) and section four, chapter eleven (in the Soviet context). I do not feel that the third element of the crisis, the presence of an existing, viable governmental infrastructure separate from the national government, needs any proof; in my opinion, *res ipsa loquitur*. This should not be understood as demeaning the importance of this element in comparison to the others; on the contrary, it too is indispensable. The existence of such an infrastructure to effect a secession movement shares equal importance with the factions and issues which lead a nation to rebel. For example, in 1860, Jefferson Davis and a group of disaffected southern Democrats could not have seceded from the Union; however, the state of Mississippi could. Therefore, the fact that the third element of the theory is so obvious that it does not warrant an in-depth discussion in no way lessens its importance to the theory.

Finally, having covered the secession theory and how the two cases before us fit that theory, the conclusion of the thesis will speak to the implications that looking at the Baltic independence movements in light of the proposed secession theory has for strategic planners today. This introduction has touched on two areas where policies could be tailored to affect the Soviet

secession movement. These areas will be re-examined in the conclusion to try to determine what effect those policies might have on the process. It is in this exercise, the planning implications as opposed to the historical interpretations, that this thesis hopes to find its greatest utility.

H. CONCLUSION

In summary, it will be the contention of this thesis that the American secession crisis had, indeed, any successful secession crisis must have, three indispensable elements, the lack of one of which will stop any such movement:

1) two separate political factions giving rise to a political controversy;

2) a particular dimension to the political controversy mentioned in the first part which rendered the resulting crisis particularly unsuitable for Constitutional/governmental adjudication;

3) the controversy mentioned in the first element involving a faction that possessed a political and governmental infrastructure already in place to effect a serious secession movement.

It will be postulated that every secession movement must have these three elements; furthermore, that the southern secession movement and the future Soviet secession movement will share the first and third elements *in toto;* however, there is a slight difference between the two cases as regards the second element; it has to do with the element which renders the crisis not suitable to adjudication by the national governments. In the case of southern secession, the dimension which rendered Constitutional adjudication inadequate to the crisis was the moral aspect of the question; in the Soviet case, the dimension which renders the crisis unresolvable is the illegitimacy of the Soviet government's position viv-a-vis the Baltic republics. Thus, while the two secession crises share two of the three elements necessary, the second element is slightly different. By studying the two movements in light of a single, broadly-based theory, the true historical parallels between the movements, the parallels needed for a profound understanding of the contemporary crisis for planning purposes, can be discussed.

I. EDITORIAL NOTE

Having presented the outline of the thesis above, I will now make an editorial note. It has been my intention to keep the chapters of the thesis as "uncluttered" as possible by moving most of the historical minutia into the footnotes. These notes are not meant to be disregarded as superfluous; they develop the context in which the main points of the chapter are developed. For example, the writings of John C. Calhoun, examined in chapter five, must be seen in the context of the other well-known nullification movements which used basically the same reasoning; these were the Virginia/Kentucky resolutions and the Hartford Convention. Rather than include that important background information in the text, I shunted it to the footnotes. This allows the important historical context to be developed without distracting from the main thrust of the chapter. This method was followed throughout the paper.

III. THE FOUNDATION OF LOCKE

The act by which the United States broke with the empire of Great Britain and asserted its right of independence was the culmination of a process that found its deepest roots in the writings of the British political and social philosopher, John Locke. Therefore, prior to an analysis of the break between the colonies and their mother country, and the form of government to which this process gave rise, an analysis of the theory of rebellion put forth by Locke will be useful in understanding the intellectual foundation of the American Revolution.

A. THE PHILOSOPHY OF LOCKE

In *An Essay Concerning the True Original Extent and End of Civil Government,* Locke firmly rejected the principle of the "divine right" of monarchs, and instead he traced the origins of just government from the movement of mankind from the "state of nature" to the formation of political institutions.[1] In the state of nature, Locke asserts that "... all men (have the right) ... to perfect freedom to order their actions and dispose of their possessions as they see fit."[2] A key presupposition here is that all men are inherently equal; none has any right to impose an arbitrary sovereignty on any other. As Locke puts it: "... there being nothing more evident than that creatures of the same species and rank ... should be equal among another without subordination or subjection..."[3]

The state of nature was a precursor to the governmental institutions instituted by mankind as a part of his process of political maturation; therefore, any rights that were present in the state of nature pre-date the formation of government, and, thus, they are not subject to arbitrary restriction by the government. Not surprisingly, Locke finds within the state of nature laws which preclude one man from "... harming another in his life, health, liberty, and property."[4] It was long a precept of English jurisprudence that one's life, liberty, and property were beyond the grasp of

the sovereign; that philosophy made itself manifest in British governmental documents as far back as the Magna Carta of the thirteenth century.[5] Therefore, Locke's placing of these rights in the state of nature dovetailed nicely with the preceding four hundred years of English jurisprudence. A corollary to this assertion of that in order to protect these "natural" rights, a man in the state of nature becomes a virtual law unto himself, meting out justice to others who have in some way encroached upon his rights. In the state of nature, each man had this power to punish transgressors. As Locke put it:

> ... in the state of nature (thus) one man comes to power over another. Yet, (this is) no absolute or arbitrary power, to use a criminal, ... but only to retribute to him so far as calm reason and conscience dictate what is proportionate to his transgression..."[6]

Thus, before the formation of a political society[7], man found himself in a position where he possessed certain rights, the transgression of which empowered him to punish the offender.

The solitude of the state of nature not being a condition that was natural to man, it followed that man was driven inexorably towards a social orientation: "God having made man such a creature, that in his own judgement it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination to drive him into society, as well as fitted him with understanding ... to continue and enjoy it."[8] Thus, the metamorphosis from "natural man" to "social man" was not a result of man's desire to divest himself of his natural freedoms; indeed, it was a process driven by human nature in spite of the loss of the individual power to enforce those freedoms. The formation of a "civil society" marked the end of the state of nature, and, as a result, it ended the right of an individual man to punish wrongs committed against his life, liberty, and property. "Because no political society can ... subsist without having in itself to power to preserve ... property, and ... punish the offenses of all those of that society, ... every one of its members had quitted this natural power, (has) resigned it up into the hands of the community; and, thus, ... the community comes to be umpire."[9] Thus, the formation of a political society by man, according to Locke, consists of these basic elements. First, the formation of the society, being the preferred state of man, is voluntary; secondly, the rights to life, liberty,

and property, which pre-date this societal formation, are in no way sacrificed during this transformation of man; only the mode of enforcement of these rights is changed.

Given the above two elements of societal formation, Locke logically concludes that:

> ... it is evident that absolute monarchy, which by some men is counted the only government in the world, is indeed inconsistent with civil society... For the end of civil society (is) to avoid and remedy those inconveniences of the state of nature which necessarily follow from every man's being judge of his own case by setting up a known authority to which everyone of that society may appeal..."[10]

Locke concluded that an absolute prince is in the state of nature "... for he being supposed to have ... both legislative and executive power in himself alone, there is no judge to be found; no appeal lies open to anyone who may fairly and indifferently and with authority ... decide ... whence relief and address may be expected."[11] To Locke, since the absolute prince could never be an impartial judge, the resulting civil institutions of government that sprang up from an absolute prince lacked legitimacy. Even further, the subjects of such a prince were not in the state of nature as men enjoying the right of protection of their rights of life, liberty, and property; they were in the state of nature as slaves. As Locke stated: "... whereas in the ordinary state of nature he has a liberty to judge of his right, ... now, whenever his property is invaded by the will and order of the monarch, he has not only no appeal, ... but, as if he were degraded from the common state of rational creatures, (he) is denied a liberty to judge and defend his right(s)."[12]

In further reflections on the ends of a political society, Locke found another reason why men are driven into societies. Not only is man inherently a social creature for whom the state of nature, in which he is divorced from any political or social contact with his neighbors, is unnatural; the enjoyment of the freedoms in the state of nature, unencumbered by any societal obligation, is contingent upon his being able to protect himself and his property from the attacks of others.

> In the state of nature, (man) hath such a right (to his freedoms), yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others ... the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit this condition ... and ... to join in society with others ... for the mutual preservation of their lives, liberties, and estates...[13]

Given this condition of the formation of the society with the above ends in mind (that is, to rectify the shortcomings of the state of nature which prevent the full enjoyment of the rights of life, liberty, and property), Locke then stated: "... the power of the society ... can never be supposed to extend farther than the common good."[14] Thus, insofar as the political institution instituted by a group acts to further the common good, the ends of that political process are proper and just. Though not stated explicitly by Locke in this section, one can logically infer from this argument that if the end of government is not directed toward the common good (that being the only reason man voluntarily withdrew himself from the state of nature), then the government itself is illegitimate, and it should be replaced by the people under its jurisdiction with another more responsive and sensitive to the true end of a just government: the facilitation of the enjoyment of the rights of life, liberty, and property by its citizens.

B. THE RISE OF TYRANNY

Having laid out the reasoning why men voluntarily leave the freedom of the state of nature and form a political society, Locke then proceeded to outline the conditions under which the people have a right to alter that society. Locke approached this subject carefully, all the while acknowledging that there were other political philosophers who disagreed with this area of his argument.[15] He prefaced his argument concerning the dissolution of government with two careful definitions: usurpation and tyranny.[16] A usurper was defined as "... whoever gets into the exercise of any ... power than other ways than what the laws of the community have prescribed..."[17] Concerning this ruler who has usurped his power, Locke was clear in his condemnation: "An usurper can never have right on his side, it being no usurpation but where one is got into the possession of what another has a right to."[18] Locke seemed to think the concept of usurpation and its inherent evil was so clear, so above argument, that he devoted only two paragraphs to the entire chapter; it is one of the shortest chapters in the treatise.

Following the definition of usurpation, Locke then proceeded to elucidate his definition of tyranny. In his definition of tyranny, Locke again inferred that an "absolute monarchy" is an illegitimate form of government; he stated:

> ...tyranny is the exercise of power beyond right, which nobody can have a right to; and this is making use of the power anyone has in his hands, not for the good of those who are under it, but for his own private, separate advantage. (It is) when the governor, however entitled, makes not the law, but his will, the rule, and his commands and actions are not directed to the preservation of the properties of his people, but the satisfaction of his own ambition, revenge, covetousness, or any other irregular passion.[19]

Locke said that tyranny can be made up of two elements, the presence of only one of which is necessary for the government to be classified as tyrannical. Both elements of tyranny are carefully defined; the first in relation to the concept of "natural rights" retained from the state of nature; and the second to the concept of the only legitimate end of a just government, the protection of the property of the people. The first element is when the ruler subordinates the law to his will--it is this element where one finds Locke's refutation of the principle of absolute monarchy, for the law is deemed to be superior to the sovereign; the second element is when the ruler fails to place first the welfare of the people under his jurisdiction. In either of those two situations, the government has been changed from a legitimate expression of the people's will into a tyrannical expression of the will of an illegitimate ruler. Locke's long explanation of tyranny can be summed up succinctly as follows: "Wherever law ends, tyranny begins."[20]

C. THE DISSOLUTION OF A GOVERNMENT

Having covered the concepts of usurpation and tyranny, Locke proceeded to the last chapter of the treatise: "Of the Dissolution of the Government." Locke listed two ways, other than foreign invasion, by which governments can be dissolved. The first way is by "altering the legislative."[21] Locke proposed a "legislative" placed in the hands of three branches of government:

1) a single hereditary person having the supreme executive power

2) an assembly of hereditary nobility

3) an assembly of representatives chosen periodically by the people.[22]

Given this form of legislative, Locke proposed four ways by which this form can be altered, thus dissolving the government. The first way was when: "...any single person or prince sets up his own arbitrary will in place of the laws which are the will of the society."[23] The second way the legislative could be altered was by the prince "...hinder(ing) the legislative from assembling in its due time, or from acting freely, pursuant to those ends for which it was constituted..."[24] The third mechanism by which the legislative can be altered was "...when by the arbitrary power of the prince, the electors or ways of elections are altered, without the consent or the common interests of the people..."[25] Finally, the prince could alter the legislative and thus dissolve the government by "...deliver(ing) the people into the subjection of a foreign power."[26] These mechanisms are remarkable in this first method of dissolving the government in that they depend on actions taken only by the prince, not the members of the two houses of the legislative branch. Locke explained this by stating: "...(the prince), having the force, treasure, and offices of the state to employ ... he alone is in a condition to make great advances towards such changes under the pretense of lawful authority ..."[27]

Another distinction made by Locke in this process of dissolution was not stated explicitly, but rather it can be inferred by his proposed remedy to the above situation. He stated: "In these and like cases, *when the government is dissolved* (emphasis added), the people are at liberty to provide for themselves by erecting a new legislative ... for their safety and good."[28] In other words, it was the tyrannical prince who, by his actions, dissolved the government; the people who moved to oust him from power were not the revolutionaries, in the sense that it was not they who altered the form of government. It was the prince who was the revolutionary since, by his actions, the government was made illegitimate, null, and void. The people who, in this instance, moved to set up a new government were simply putting in place a legitimate government in the place of the old one which, through the actions of the prince, now no longer had any claim on the

legitimate exercise of power. Locke went further in his explanation: "For the society can never, by the fault of another, lose the native and original right it has to preserve itself, which can only be done by a settled legislative, and a fair and impartial execution of the laws made by it."[29] Having laid the blame for the dissolution of the government at the feet of the prince, Locke then took the final step and provided a theory that such a prince could be overthrown:

> But the state of mankind is not so miserable that they are not capable of using this remedy, until it be too late to look for any. To tell people that they may provide for themselves by erecting a new legislative when ... their old one is gone is only to tell them they may expect relief when it is too late, and the evil is past cure. This is in effect no more than to bid them first be slaves, and then to take care of their liberty ... men can never be secure from tyranny if there be no means to escape it until they are perfectly under it. And, therefore, it is that they have not only a right to get out of it, but to prevent it.[30]

Thus, in the preceding argument, Locke laid out the philosophical foundation for the overthrow of a tyrannical monarch.

Having covered the first way be which a government can be dissolved (*viz.*, by the alteration of the legislative by the tyranny of the prince), Locke developed a second mechanism of dissolution. "There is ... secondly another way by which governments are dissolved, and that is when the legislative or the prince, either of them, act contrary to (the people's) trust."[31] This occurred when the "legislative acts against the trust reposed in them when they endeavor to invade the property of the subject, and to make themselves or any part of the community masters or arbitrary disposers of the lives, liberties, or fortunes of the people."[32] Again, the rectification of this tyranny would fall into the hands of the people: "When the legislative shall transgress this fundamental rule of society, and ... endeavor to grasp themselves or put into the hands of any other an absolute power over the lives, liberties, or estates of the people, by this breach of trust they forfeit the power the people had put into their hands ... and it devolves to the people, who have a right to resume their original liberty and ... provide for their own safety and security."[33] Thus, Locke proposed, that if the political society of a commonwealth had been dissolved by the tyranny of either the prince (executive power) or the legislature, the people had a right and a duty

to alter the form of the government to check the tyranny and restore the true purpose of political society: the common good of its citizens.

D. THE FUNDAMENTAL PRINCIPLES OF LOCKE'S THEORY OF GOVERNMENT

Taking Locke's theories of government and distilling them to discover their basic essence, one finds in them common threads of thought which undergird their legitimacy. The most fundamental precept of Locke is the concept of natural rights; that is, rights exist that predate political society; these rights are fundamental rights of nature: life, liberty, and property. These rights, having predated political society, are beyond the grasp of even a national sovereign in that they may not be arbitrarily disposed of. The second precept of Locke follows logically from the first; *viz.*, that the sole purpose of a political society is to facilitate the enjoyment of those natural rights by all its citizens; that the formation of a political society turns over to a national sovereign only those powers necessary to impose sanctions on those who attempt to abridge, usurp, or otherwise limit the enjoyment of those natural rights by the citizens of the commonwealth. Any other exercise of power by the sovereign is an illegitimate, illegal expression of a power he wields only by the leave of the citizens of the commonwealth. Furthermore (and this is a critical point, especially since Locke wrote during a period when the international scene was dominated by "absolute monarchs"[34]), by the exercise of this illegitimate power, it is the sovereign who commits the act of revolution; this sanction does not fall upon the people when they act to rid themselves of the tyrannical prince. Considered as a whole, and taken in the context of the times in which he wrote, Locke's treatise can certainly be considered a revolutionary document.[35]

E. THE DANGER OF ANARCHY - THE IMPORTANCE OF A CONSPIRACY OF TYRANNY

The end of Locke's treatise dealt with a rather obvious argument against his theory; *viz.*, that the repository of such sovereignty in the people would cause an unstable, volatile political system that would easily be overthrown on a mere pretext of tyranny. To answer this assertion,

Locke left the realm of philosophical speculation that colored much of his reasoning heretofore and countered this objection with a recourse to simple human nature. Locke declared that it would be arguing against the past history of political man to assert that he would dispose of his government over a trivial disagreement with those in power. It instead would require a pattern of abuses, borne over a long period of time, before the people would rouse themselves to throw off the yoke of tyranny:

> ...such revolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty will be borne by the people without mutiny or murmur. But if a long train of abuses, prevarications, and artifices, all tending the same way, make the design visible to the people... it is not to be wondered that they should then rouse themselves and endeavor to put the rule into such hands which may secure to them the ends for which government was at first erected ... let (no one) say that mischief can arise ... as often as it shall please a ... turbulent spirit to desire the alteration of the government. It is true that such men may stir whenever they please, but it will only be to their ruin... Till the mischief be grown general, and the ill designs of the rulers become visible ... to the greater part, the people, who are more disposed to suffer than right themselves by resistance, are not apt to stir.[36]

Having said this, Locke attempted to further disparage the argument of frequent rebellion by *reductio ad absurdum:* "But if they who say it lays a foundation for rebellion mean that it may occasion civil wars or intestine broils, to tell the people they are absolved from obedience when illegal attempts are made upon their liberties or properties ... they may as well say upon the same grounds that honest men may not oppose robbers or pirates because this may occasion disorder or bloodshed."[37] By such logic did Locke attempt to refute the argument that he was advocating frequent rebellion.

F. A CRITIQUE OF LOCKE'S THEORY OF GOVERNMENT

Any critique of this treatise of government must start with the defense against the charge of advocacy of anarchy. Locke's responses in the latter part of his treatise to the argument that his system will lead to anarchy are indeed the weakest part of his essay; yet, there is no convincing way to refute the point. He seemed almost to be saying that complete democracy, with its inherent tendency towards anarchy, is, despite that tendency, more desirable than absolute

monarchy. He seems to be saying that the people who have a stake in the property of the commonwealth can always be relied upon to ensure the government is just, legitimate, and limited. The essay speaks in extremes, of the shift from absolute monarchy to bloody, democratic overthrow of totalitarian regimes. It speak of abolition of tyranny *now*, through violent confrontation, rather than slow, peaceful change working through the established political society. Given the power that absolute monarchs had arrogated unto themselves, with the attendant powers of security and the military, one can sympathize with the arguments of Locke; he was, after all, reacting to centuries of political history in which absolute monarchies were the rule rather than the exception. In the hindsight of history, with which one can view both the relative inefficiency of the United States government from 1781-1789 (under the Articles of Confederation) and the excesses of the French revolution a decade later, one would be inclined to temper this overly optimistic faith in the inherent ability of the citizens of a "commonwealth" to form a government which best protects their life, liberty, and property.

Another criticism of Locke's analysis involves the emphasis of a strong "prince," a strong executive, as the main agent by which tyranny makes its insidious inroads against liberty. While it is true that Locke did state that in the second means of "altering the legislative" a legislative body has an equal probability of encroaching on liberty, the tone and tenor of the essay leaves no doubt as to against whom it is directed: a monarch. This tendency to view the legislature as the bulwark against tyranny greatly influenced American political thinkers of the eighteenth century; from a perspective of a Locke or a Jefferson, this tendency is perfectly natural, given the personal experiences of those two thinkers and the status quo of the governments of the seventeenth and eighteenth centuries. However, the development of a tyrannical purpose is no less damaging if it is formulated in the legislature. This was recognized by such political thinkers as Montesquieu, who devised a system of concurrent powers exercised by different branches of government so that the powers of one might "check" the powers of the others. When analyzes, this

concept is diametrically opposed to the concept of Locke, who found the greatest danger to the liberty of the citizens of a commonwealth lurking in the executive. These two themes, then, (*viz.*, the legislature as the guardian of the liberty of the people versus the concept of a "check" on the legislature) would become intermixed in the American experience of government; the former being used to justify the Revolution, the latter being employed to develop a system of government to protect against the rise of tyranny. Thus, Locke's essay finds its usefulness not in its blueprint for a just and lasting government (which in itself is ironic, given its title), but as a justification for revolution. Given Locke's vehemence in denying that his ides would not lead to revolution but produce a stable government based on the protection of life, liberty, and property, it is in the use to which his theories were put where one finds the ultimate irony of the *Second Treatise on Government.*

The final criticism of the treatise deals with the inference that only people with an interest in property could be effective guardians of the political society. Locke gave equal billing to the three rights of life, liberty, and property: it was clear that every one in the society possessed the first two "natural rights"; it was equally clear that only a few possessed the latter to any substantial degree. Although Locke was never as explicit on this concept to advocate that there should be a set property-holding criterion for participation in the political process, and although he did write about the monarch encroaching on the rights of life and liberty, the tone of the essay is slanted towards the protection against invasions against property. Indeed, Locke devoted an entire chapter of a treatise on government to the development of a theory which justified the ownership of property above the level needed for sustenance.[38] Furthermore, as he advanced his explanation of man's congregating in political societies, he stated: "...the enjoyment of the *property* (emphasis added) he has in this state (the state of nature) is very uncertain, and constantly exposed to the dangers of others."[39] Again, in the same argument, he stated: "The ... end of men's putting themselves under government is the preservation of their property."[40] The sum of these

assertions was to give the impression that only those with a property interest could define the "common good" of the state. This proposition was not new to Locke.[41] It would, in time, be carried into America, where participation in the political process would be sharply limited based on property holdings. The danger of this concept is that, given that large property holders would be a minority in any society (as is usually the case), and given that it was up to property holders to guard against the encroachment of tyranny, it is possible that property holders might put property rights ahead of liberty when deciding if the monarch was acting towards the "common good." Thus, an overthrow of the government, if led by these citizens, might be based on economic considerations, not the principles of liberty. Locke depends on the common vision of the people to fend off the approach of tyranny. If the people, due to varying degrees of economic success, did not share this common vision, their vision of tyranny would differ, and, thus, so would their response to it.

Locke's treatise, even with its shortcomings, developed the theories of revolution that were utilized by Americans almost a century later to justify their break from the British Empire and their War for Independence. As the philosophical foundation for our very legitimacy, they have not ceased in their usefulness. Indeed, they speak eloquently of a society's need to be free; they speak eloquently of the transitory nature of governments set up by illegitimate exercise of police power. As such, these ideas will continue to have relevancy today, for understanding our own philosophy of government, for understanding the southern move towards independence in 1860, and for understanding the desire of all peoples to be free from the arbitrary exercise of tyranny.[42]

CHAPTER III ENDNOTES

1. Locke, John, *An Essay Concerning Civil Government*, located in Burt, Edwin A. (ed.), *The British Philosophers from Bacon to Mill*, Random House Modern Library, New York, New York, 1937. This general statement is gleaned from the sentiments expressed by Locke in chapters 1, 2, and 9 of the Essay.

2. *Ibid.*, p. 404.

3. *Ibid.*, p. 404.

4. *Ibid.*, p. 405.

5. McDonald, Forrest, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*, University Press of Kansas, Lawerence, Kansas, 1985, p. 12. The fact that the idea of a right to "life, liberty, and property" existed back at least as far as 1215 can be seen from an inspection of some of the main clauses of the Magna Carta: a) "Neither (the king) or his bailiffs shall seize any land ... for any debt so long as the chattels of the debtor are sufficient to pay the debt." ("chattels" being defined as: personal property as distinct from real property, from Barron's Law Dictionary); b) "... no bailiff ... shall put anyone on trial, upon his bare word, without credible witnesses to support it..."; c) "... no freeman shall be taken, imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor shall (the king) go upon him, nor shall (he) send against him, except by the lawful judgement of his peers or by the law of the land..."; d) "... if anyone has been dispossessed or removed by (the king) without the lawful judgement of his peers ... from his lands ... (the king) will immediately restore them to him..."; finally, e) "all fines made unjustly and against the law of the land ... shall be entirely pardoned." In the enumeration of these rights, in which one finds the seeds of the liberties granted by the United States Bill of Rights, one can easily see that liberty and property were rights to which the English had long grown accustomed to considering above the arbitrary grasp of a sovereign. The idea that the "law" was the master of the sovereign, the antecedents of which can be seen in clause (c) above, was to grow and mature through the governmental and legal practice of England; in 1927, in The Great Charter of the Liberties of England signed by King Edward, the British monarch reaffirmed that: "... no freeman shall be taken or imprisoned, or be disseised of his freehold or liberties ... or be outlawed or exiled or in any other wise destroyed, nor will (the king) pass upon him or condemn him, but by the lawful judgement of his peers or by the law of the land." Thus, the concept of life, liberty, and property protected by a form of "due process" of the law, grew and matured in British jurisprudence. Concurrent with the assumption of the British throne by William of Orange in 1689, after a period marked by fierce political conflict during the reigns of Charles II and James II, and in the year before Locke's treatise was published, the British monarchy consented to the Bill of Rights of 1689. This far-ranging and sweeping document, a reaction to the monarchial excesses of the previous two sovereigns, comes very close to the U.S. Constitution's first ten amendments. The following acts of the sovereign were declared illegal: a) the suspension of a law of Parliament by "regal authority"; b) dispensing with the execution of a law of Parliament by the same authority; c) setting up courts of commissioners for ecclesiastical causes of action;

and d) levying money by prerogative of the crown without the consent of Parliament. Furthermore, the following rights were affirmed: a) the right of petition to the king; b) the free election of members of Parliament; c) freedom of speech of members of Parliament; d) trial by a jury of one's own peers; e) the frequent meeting of Parliament. In addition, the following practices were banned: a) the keeping of a standing army in peacetime without the consent of Parliament; and b) requiring excessive bail, imposing excessive fines, or inflicting unusual punishments.

Thus, British readers of Locke's treatise were well-familiar with the concept of "natural rights" described by Locke. See Rember, Charles, *The Law of the Land, The Evolution of Our Legal System*, Harper and Row Publishers, 1980, for an excellent history of the English legal theories discussed in this note.

6. Locke, p. 406.

7. *Ibid.*, p. 413.

8. *Ibid.*, pp. 415-434.

9. *Ibid.*, p. 437.

10. *Ibid.*, p. 438.

11. *Ibid.*, p. 439.

12. *Ibid.*, p. 439.

13. *Ibid.*, p. 453.

14. *Ibid.*, p. 455.

15. *Ibid.*, pp. 494-503. Locke puts forth some of those arguments in the form of objections about his assertions, saying, for example, "...to this, perhaps, it will be said ... to lay the foundation of government in the unsteady opinion of the people is to expose it to certain ruin." (p. 493) He named one of his detractors: "Barclay, the great champion of absolute monarchy..." (p. 501).

16. *Ibid.*, chapters 17 and 18.

17. *Ibid.*, p. 484.

18. *Ibid.*, p. 484.

19. *Ibid.*, pp. 484-485.

20. *Ibid.*, p. 486.

21. *Ibid.*, p. 490.

22. *Ibid.*, p. 491.

23. *Ibid.*, p. 491.

24. *Ibid.*, p. 492.

25. *Ibid.*, p. 492.

26. *Ibid.*, p. 492.

27. *Ibid.*, p. 492.

28. *Ibid.*, p. 493.

29. *Ibid.*, p. 493.

30. *Ibid.*, p. 493. See Locke, *op. cit.*, pp. 498-499, for Locke's justification of violence in the overthrowing of a tyrannical monarch.

31. *Ibid.*, p. 493.

32. *Ibid.*, p. 493.

33. *Ibid.*, p. 494.

34. For example, the following monarchs or future monarchs were living during the year Locke wrote his essay: Frederick III of Prussia, Louis XIV of France, Christina of Sweeden, Frederick the Great of Prussia (born the previous year), and Peter the Great of Russia. (Source: Grun, Bernard, *The Timetables of History,* Simon and Schuster, New York, New York, 1979, p. 314.)

35. Of course, the concept of "natural rights" had been introduced in British legal theory as far back as the Magna Carta. Interestingly, there has been a shift through the years in British governmental practice as to the power of the House of Commons vis-a-vis the House of Lords and the monarchy. For example, the Commons, since the first decade of this century, has had the power to pass certain classes of bills without the consent of the House of Lords. Locke did not totally disregard the possibility of a tyrannical legislature: "It is a mistake to think that this fault is proper only to monarchies. Other forms of government are liable to it as well. (Abuse of power) becomes tyranny, whether those that (abuse) it are one or many." (Locke, p. 486)

36. Locke, pp. 495 and 497.

37. *Ibid.*, pp. 495-496.

38. *Ibid.*, chapter five.

39. *Ibid.*, p. 453.

40. *Ibid.*, p. 453. To be completely accurate, it must be noted that during this time, the word "property," derived from the Latin *proprius* (meaning appropriate to or particular to a single person), was often used to denote more than just physical real or personal property

(McDonald, pp. 10-11). Indeed, Locke himself declared that he was combining "life, liberty, and estate into the general heading of property." (Locke, p. 453) However, Locke's devotion of such a large portion of his essay to the defense of private property (and in this sense, property was defined as real and personal property) leads his reader to assume that it was this narrower definition of property to which he was holding when he stated that property holders had the stake in the liberty of a political society. McDonald also states that the Founding Fathers of the United States often operated under the expanded definition of property. (McDonald, p. 10) Be that as it may, there were more than a few of those founders who wished to impose strict real property qualifications on the new American voters. In addition, there is further evidence of the importance placed on real property in British governmental history. Fully one-third of the articles of the Magna Carta deal with restrictions on the agents of the king when attempting to seize real property. Thus, while the word "property" held connotations for Locke that may have transcended a narrow definition, the manifestations of the concept "property" most often expressed themselves in terms of the value of the real, tangible possessions of the people.

41. For example, the idea of the value of property in promoting good citizenship can be traced as far back as Aristotle: "Property should be ... as a general rule, private; for when every one has a distinct interest ... (he) will make more progress..." (Aristotle, *Politics,* quoted in Ebenstein, William, *Great Political Thinkers,* The Dryden Press, Inc., Hinsdale, Ill., 1969, p. 83) Thus, the concept of private property as the *sine qua non* of good citizenship was certainly not exclusively held by John Locke.

42. For a short discussion of the Lockeian nature of the southern secession movement of 1860, *quod vide* chapter 10, note 8.

IV. THE COLONIAL ARGUMENT FOR INDEPENDENCE

A. INTRODUCTION

Any government founded upon such principles as espoused by John Locke will be more sensitive to claims against its legitimacy than one founded on the "divine right of kings" theory, or one headed by an undisguised, unrepentant tyrant. The chasm that exists between the theory of equality of rights upon which a government claims legitimacy and the actual practice of that government often leads to conflicts and contradictions that are difficult for political theorists to rationalize.[1] The divine monarch can rationalize these inequities by claiming that his will is the will of God, not subject to debate on earth, whether that debate takes place on the pages of a newspaper or in the halls of legislature. To the tyrant, the process of such rationalization is not necessary; the restriction of liberty is imposed by terror and force; the only earthly power to whom he is accountable is one who can muster a stronger force against him. But to a government whose legitimacy rests on the principle of the equality of man, and whose political machinery is set up so as to ensure that those who have a stake in the society also have a voice in its operation, any contradiction of that precept undermines its validity. This was the predicament in which the government of Britain found itself vis-a-vis the American colonies in the latter half of the eighteenth century.

This is not to say, of course, that English ministers at the time of the Revolution were overly-sensitive about the rights of the colonists; indeed, a good argument can be made to the contrary. The significance of this fact, however, is reflected in early American political theorizing about the relationship of the colonial peoples to their mother country. The concept of self-government was deeply interwoven into the fabric of American political society.[2] This spirit of independence, this enjoyment of self government, so deeply rooted in the "rights of Englishmen,"

lay coiled inside a Pandora's box, awaiting only the crisis that would provide the key to release its powerful passions against the rule of the mother country. In typically American fashion, this crisis resulted from a controversy over the power of taxation.[3]

Early American writings on the relationship of the colonies to England contain a major theme: American colonists, having migrated from England of their own free will, did in no way forfeit any of their rights as Englishmen; and this included the right to have their property protected by due process of law.[4] Thus, any attempt to appropriate monies from the colonies without the consent of the colonists was an illegal attack on the property of the Americans. This vehicle of the taxation question led to an in-depth questioning of the legal relationship between Britain and the Colonies.

B. TAXATION AND THE RIGHTS OF ENGLISHMEN

On March 6, 1766, an article that appeared in the "Massachusetts Gazette" spoke to these very concerns. The article stated that the relationship of the colonies to the mother county turned on two legal points: first, "... the constitutional power of the British Parliament (to determine the legality of taxation); (secondly), the actual exertions of Royal Prerogative, ... under which it is admitted that the colonies lay claim to ... their respective legislative privileges."[5] The author then proceeded to examine those two points. He answered the first point by an argument based on the concept of English liberty. As has occurred in the United States in over two hundred years of government[6], the concept of liberty had undergone a maturation process in England since it had been introduced to British jurisprudence as early as the thirteenth century. "Liberty" did not mean mere freedom from arbitrary restraint; it was a concept that encompassed much more than that; is was a concept that, in the final analysis, truly defined the relationship of the citizen to his government. The "Gazette" article spoke to this theme:

> English Liberty is a propriety attached to the individual of the community, ... and might be defined (as) the primitive right that every freeholder had of consenting to those laws by which the community was to be obliged. Time and a change of circumstance extended this

circle of comprehension, and made every subject ... a member of the legislature ... usage and convenience transformed that indulgence into a right.[7]

The author then expounded on this theme by stating that, due to the fact that the colonists are not represented in the legislature, there is no duty for the Americans to be bound by its laws:

> But an Englishman in America has no means of being represented in the British Legislature ... where then is to be found his consent to parliamentary acts operative there; and by what construction can he be said to give his voice? ... It is hard to conceive from what constitutional principle applicable to a colony, not a conquered country, (the colonist's) obedience to a-statute-law can be deduced.[8]

The author then went further, asserting that it was the American legislative assemblies, not the British Parliament, which held jurisdiction over the colonists in most cases: "The delegation ... of a legislative power to the colonies must ... be considered ... as exclusive of all parliamentary participation in the proper subjects of their legislation, that is to say, in cases not repugnant to the laws of Great Britain."[9] Thus, the author rejected the legitimacy of Parliament's jurisdiction over the American colonies in all matters; only if the American assemblies proclaimed a law contrary to the law of England could the Parliament act with legitimacy in regard to the colonies.

In regard to the second point concerning the Royal Prerogative of the king to regulate the affairs of the colonies, the author of the "Gazette" article theorized that, since the king is but a limited monarch, subject to the laws of Parliament, and if the Parliament can hold no power over the colonies since the colonists are not actually represented there, then neither can a lesser sovereign hold such a power.

> Is not the king a perpetual constituent branch of their legislatures representedly present in every assembly, and an actual party to all their laws? And this being the case, prerogative must indeed be owned to have tempered its operations agreeable to the spirit of the English constitution, and to have thus generously bound and limited itself. Nor could it well have happened otherwise: for it, as has been said, the common law (of England) followed the (British) subject to America, it is presumed that prerogative could have only acted there consistently with, and in conformity to it.[10]

Thus, the author logically concluded that, the jurisdiction of the crown being subordinate to that of the legislature, if the legislature has no legitimate jurisdiction, then neither can the monarch.

C. RICHARD BLAND OF THE THEORY OF CONTRACT

In the same week that the above article was published, a Virginian, Richard Bland, published an essay entitled *An Inquiry Into the Rights of the British Colonies.* In it, he sought to probe more deeply into the question of the fundamental relationship between the colonies and their mother country. The Bland essay has at once a tone of a scholarly legal exposition and a fiery radical statement of the rights of the colonies. In the first paragraph, Bland sets the radical tone. He says the effort to tax the colonies without their consent "...endeavours to fix shackles upon the American colonies: shackles which, however nicely polished, can by no means sit easy upon men who have just sentiments of their own rights and liberties."[11] Thus, Bland categorized the attempt of the Parliament to impose a foreign jurisdiction upon the colonies (foreign in the sense that the colonists are not represented in the legislative body) as an act that was repugnant to a nation brought up on the principles of liberty and justice that were their birthright as Englishmen. He then stated the main point of his essay in Lockean terms: "...if imposing taxes upon the colonies by authority of Parliament, (the government) has pursued a wise and salutary plan of government, or whether they have exerted pernicious and destructive acts of power."[12] Bland seemed to be laying a foundation for a charge of tyranny against the British government, a charge which could lead to the justification for a revolt against British authority in the colonies.

It had been the assertions of some political theorists that the colonies did indeed enjoy the right of representation in Parliament through the theory of virtual representation. As the argument was put:

> ...the inhabitants of the colonies do not indeed choose members of Parliament; neither are nine tenths of the people of Britain electors, for the right of election is annexed to a certain species of property ... yet are they (the non-voting citizens of Britain) not represented in Parliament? Are they all arbitrarily bound by laws to which they have not agreed? ... All British subjects are the same; none are actually, all are virtually, represented in Parliament: For every member of Parliament sits in the House not as a representative of his own constituents, but as one of that august Assembly in which all the Commons of Great Britain are represented.[13]

Bland, in his reply, rejected this theory.

> ... I cannot comprehend how men who are excluded from voting at elections for members of Parliament can be represented in that assembly, or how those that are elected do not sit in the House as representatives of their constituents. These assertions appear to me not only paradoxical, but contrary to the fundamental principles of the English constitution.[14]

Thus far, Bland had only asserted that it is the absence of American representatives in Parliament that makes its jurisdiction illegitimate. This situation could be remedied, obviously, by electing colonial representatives to the House of Commons. Bland went one step beyond that assertion, framing this argument in the legal terms of a compact between a sovereign and his subjects who have voluntarily quitted the sovereign's nation:

> Now when men exercise this right (to quit the society of which they are a member) ... and withdraw themselves from their country, they recover their natural freedom and independence. The jurisdiction and sovereignty of the state they have quitted ceases; and if they unite, and by common consent take possession of a new country, and form themselves into a political society, they become a sovereign state, independent of the state from which they separated. If then the subjects of England have a natural right to relinquish their country ... they must have a right, by compact with the sovereign of the nation, ... to form a civil establishment upon the terms of the compact.[15]

This was truly a remarkable assertion. Bland carefully chose his words to convey a sense of equality between the colonies and Britain. A contract is defined as a promise for breach of which the law gives remedy. The essential elements of a contract are: a) the parties to the contract must be competent to contract; b) consideration; c) mutuality of agreement; and d) mutuality of obligation.[16] Thus, the civil society that existed in America since the founding of the colonies and the relationship of that society to the crown were the result of a contract between the crown and the colonies, a contract that imposed mutual obligations on both parties. Bland asserts that the British king is obligated to an equal application of the law upon colonists as well as Englanders. Furthermore, it is the king, not the parliament, with whom the contract was sealed. Therefore, Parliament, in attempting to interpose its sovereignty between the two parties to the original contract, is acting in an illegal manner.

> If the British Empire in Europe and in America is the same power, and if the subjects are both the same people, and all equally participate in the adversity and prosperity of the whole, then what distinctions can the difference of their situations make, and why is this distinction made between them? ... by what right is it that the Parliament can exercise such a power (the unequal application of the law) over the colonies, who have as natural a right

> to the liberties and privileges of Englishmen as if they were actually resident in the kingdom? Great is the power of Parliament, but, great as it is, it cannot deprive the people of their natural rights, nor ... can it deprive them of their civil rights, which are founded in compact, without their own Parliament's consent.[17]

In this essay, Bland was calling for the equal protection of the law for all British colonies. To the original compact, by which the colonists divested themselves of their Lockean natural rights and formed themselves into a civil society based upon loyalty to the Crown, Parliament was not a party; therefore, its imposition of its jurisdiction upon the colonies was illegal, and, therefore, could be legitimately resisted.

D. THE EMERGENCE OF A NATIONAL IDENTITY

If the colonies had a legal right to resist the authority of Parliament, it also had a motive for doing so. Bland advanced the argument that the colonies had a natural affinity towards each other which facilitated cooperation on political matters, this cooperation coming at the expense of any loyalty felt to the Crown: "The colonies upon the continent of North America lie united to each other in one tract of country, and are equally concerned to maintain their common liberty ... (one) will find that bodies in contact, and cemented by mutual interests, cohere more strongly than those (bodies) at a distance, (having) no common interests to preserve."[18] In these sentences, one finds the true source of the colonists' dissatisfaction with British rule. The seeming unfairness of the British tax code was merely the most notorious vehicle in which the Americans were to ride on their road to independence. It was a focal point; a point on which everyone could seize to rally the people for the revolutionary struggle ahead. The deeper motivation to American independence, however, can be seen in Bland's last sentence. The colonists, nurtured on the principles of British liberty, experienced in the art of self-government, and less inclined to view themselves as merely a part of another nation's Empire, were beginning to see that an American national identity was beginning to emerge, independent from, indeed hostile to, the British

influence over their colonies. In short, the colonies were beginning to think of themselves as Americans, not Englishmen.

This shift in the perceptions of the colonists as to their national identity was not a process that occurred overnight.[19] But it was a process hastened by their reflection on the nature of liberty and by their realization of the untold wealth and beauty of America. As Silas Downer put it in 1768:

> When we view this country in its extent and variety of climates, soils, and produce, we ought to be exceeding(ly) thankful to divine goodness in bestowing it upon our forefathers, and giving it as a heritage for their children. We may call it the Promised Land ... a land wherein we may eat bread to the full ... in a word, no part of the habitable world can boast of so many natural advantages as this norther part of America.[20]

However, this early paradise faced only one serious threat: the deprivation of the liberty of its citizens. "But what will all these things avail us, it we be deprived of that liberty which the God of nature has given us."[21] The picture here was of a nation whose citizens enjoy the abundance of nature and the privileges of liberty; only an interloper, a usurper, a tyrant, could enter this earthly paradise, and, by arbitrary acts of tyranny, render its blessings utterly void of their usefulness. Little by little, Americans such as Bland and Downer were shedding their British identity and adopting an American one. Though the argument would continue to be advanced in the terms of the Rights of Englishmen, the men putting these arguments forth were increasingly considering the rights of Americans; that is, the right to govern this fruitful, abundant land by their own counsel.

E. THOMAS JEFFERSON AND THE RIGHTS OF ENGLISHMEN

In 1774, as instructions to the Virginia delegation to the first Continental Congress, Thomas Jefferson penned a resolve that he hoped would be introduced into and adopted by that body concerning the relationship of America to its mother country, England. The resolution was not adopted; yet the instructions stand today as an indication of the direction in which Jeffersonian political philosophy was tending two years before he penned the famous Declaration. Jefferson

initially stressed the joint nature of the petition; he stated that individual colonies had previously petitioned the king for redress of injuries; now, the appeal was coming from the whole of the colonies united in their opposition to British tyranny:

> ... these, his states, have often individually made humble application to his imperial throne, to obtain, through its intervention, some redress ... to none of which was even an answer condescended. Humbly to hope that this, their joint address ... would persuade his majesty that we are asking for (rights, not favors).[22]

Jefferson then proceeded to lay out the argument that the inhabitants of America were descended from British citizens who had emigrated from the mother country of their own free will, in the process of such emigration losing none of their rights as British citizens. He draws an historical analogy between this emigration and the one which had, years before, settled England: "(The) Saxon ancestors ... had left their native wilds and woods in the North of Europe, and had possessed themselves of the Isle of Britain ... nor was there ever any claim of superiority or dependence asserted over them, by that mother country from which they migrated."[23] The title of this essay by Jefferson (*A Summery View of the Rights of British America*) belies the fact that Jefferson was talking of the relationship between the two countries as one between two equals; that is, Jefferson is not talking of a nation that enjoyed its rights at the sufferance of the British crown; he is speaking of a nation that was making claims against the British government as equal partners in the international arena. Then Jefferson turned his attention to the two facts that tended to weaken the Americans' claims for equality: British fiscal support and British military protection. Jefferson dismissed British economic support as irrelevant to the economic prosperity of the colonies: "No shilling was ever issued from the public treasury of His Majesty, or his ancestors, for (the colonies') assistance, till the very late times, after the colonies had become established on a firm and permanent footing."[24] In a like manner, Jefferson dismissed the British military protection of the colonies as nothing more than a country acting selfishly to protect its own economic interests:

> ... indeed, having become valuable to Great Britain for her commercial purposes, Parliament was pleased to lend (the colonies) assistance against an enemy who would fain have drawn to herself the benefits of their commerce. Such assistance ... they have often before given to Portugal and other allied states with whom they carry on a commercial intercourse. Yet these states never supposed that by calling in her aid, they thereby submitted themselves to her sovereignty ... we would show that (the military aid received from Britain) cannot give a title to that authority that the British Parliament would arrogate over us.[25]

Having dealt thus with those arguments, Jefferson then moved boldly into an area that any student of John Locke would have recognized as dangerous: ferreting out in all the various and sundry acts of Parliament a plan, a conspiracy, or usurpation and tyranny on the part of the British sovereign; not isolated acts of tyranny, but a pattern so plain and undeniable that it would give the citizens of America a right to throw off the tyrannical yoke of the Crown and to establish in its place another government more sensitive to its natural rights. Jefferson's meaning was clear; he was laying the groundwork for the justification for an American revolution:

> ... (during) the reigns which preceded his Majesty's, ... the violations of our rights were less alarming, because repeated at more distant intervals, than that rapid and bold succession of injuries, which is likely to distinguish the present from all other periods of American history ... Scarcely have our minds been able to emerge from the astonishment into which one stroke of Parliamentary thunder has involved us, than another heavy and more alarming one is falling upon us. Single acts of tyranny may be ascribed to the accidental opinion of the day; but a series of oppressions, begun at a distinguished period, and pursued unalterably through every change of ministers, too plainly prove a deliberate, systematical plan of reducing us to slavery.[26]

There is no question but that in that paragraph, Jefferson was threatening England with revolution.

That Jefferson was speaking for an America which assumes equality with Great Britain is made evident in the closing of the essay: "... these are our grievances which we have thus laid before his Majesty, with that freedom of language and sentiment which becomes a free people claiming their rights as derived from the laws of nature, and not as the gift of their Chief Magistrate."[27] After claiming this equality, it seems unclear as to what Jefferson is asking for. He stated that the colonies were willing to negotiate concerning their exact relationship to England in the future: "On their part, let them (the English) be ready to establish union on a generous plan. Let them name their terms, but let their terms be just."[28] Yet the tone and tenor of the essay

makes it clear that for the terms to be "just," as the price for America to remain wedded to England, the British king and parliament would have to renounce their sovereignty regarding the internal affairs of the colonies, substituting instead a loose economical union between two equal nations. Obviously, no power on earth, and especially not one as powerful and proud as the English, would consent to such a bargain.

This essay is very interesting in that it presented a fundamental paradox to the British government regarding the colonies. The Americans were demanding their rights as Englishmen; yet, England's granting these rights of self-government to the American colonies, her renouncing all claims to sovereignty as to the colonists' internal affairs, would guarantee American independence, thereby detaching them from the Empire just as surely as would a war of independence. This fact could not have been lost on such American leaders as Thomas Jefferson. His phrasing and terminology used in the essay make it clear that it was carefully crafted to speak to a specific purpose: the justification of an American revolution. How could Jefferson have been taken seriously when he stated that he desired "... fraternal love and harmony throughout the whole empire."[29] By the time this essay was written, 1774, America was well on its way to becoming an irresistible force of independence set on a collision course with the immovable object of British military power. All the talk of the rights of Englishmen was well on its way to begin, not a well-reasoned plea for conciliation and compromise, but a justification for revolution. Perhaps that is truly what the Rights of Englishmen had been all along.[30]

F. THOMAS PAINE AND THE CATALYST OF REVOLUTION

In July of 1776, the prospects for a peaceful settlement of colonial grievances had all but disappeared. This transition from the hope of a conciliatory settlement to the conviction that armed revolution was inevitable found its clearest expression in the writings of Thomas Paine. Paine's writing is unique in the degree from which the style departed from that of Bland, Jefferson, and other early American political writers. Whereas the influential writers of the pre-

war era tended to be well-educated leaders of their respective communities[31], Paine had been an English laborer who had held jobs previously as a corsetmaker, schoolteacher, and storekeeper.[32] Whereas most political writers of this period covered their arguments for revolution with the glossy veneer of legal terminology and philosophical discourse, Paine spoke to the common man about his rights in a manner that eschewed the stylish legal phrase of a Jefferson; thus, his importance lay in the fact that it was he, building upon the philosophies developed by the colonial political theorists, who was able to finally galvanize the common man to action.[33]

Paine was one of the first writers to reject compromise with Great Britain. He characterized such sentiment as an "agreeable dream"[34] and stated: "By referring the matter from argument to arms, a new era for politics is struck--a new method of thinking has arisen. All (prior) plans and proposals ... are like the almanacs of the last year which ... are superseded and useless now."[35] Paine's blunt style showed through in his condemnation of England: "But Britain is the parent country, say some. Then, the more shame upon her conduct. Even brutes do not devour their young, nor savages make war upon their own families..."[36] Again and again, Paine hammered home the point that only war could save the colonies from ruin:

> Men of passive tempers look somewhat lightly over the offenses of Great Britain and, still hoping for the best, are apt to call out (for friendship). But examine the passions and feelings of mankind ... if you can say that you can still pass over the violations (of Britain), then I ask, Hath your house been burnt? Hath your property been destroyed before your face? ... Have you lost a child by their hands? ... if you have not, then you are not a judge of those who have. But if you have, and can still shake hands with the murderers, then you are unworthy of the name husband (or) father ... and you have the heart of a coward, and the spirit of a sycophant.[37]

Clearly, for Thomas Paine, the time for talking had passed. Indeed, he remarked: "... nothing flatters vanity or confirms obstinacy in kings more than repeated petitioning ... since nothing but blows will do, for God's sake let us come to a final separation."[38]

In addition to the acts of tyranny visited upon the colonies in the forms of British taxes and troops, Paine gave another reason why the revolution must come now: the colonists face utter ruin under the direction of England.

> But admitting that matters were now made up, what would be the event? I answer, the ruin of the continent. And that for several reasons ... First, the powers of governing still remaining in the hands of the king, he will have a negative over the whole legislation of this continent ... he has shown himself such an inveterate enemy to liberty, and discovered such a thirst for arbitrary power, that he is ... not the person (to have this power) ... Secondly, that even the best terms we can expect to obtain can amount to no more than a temporary expedient ... emigrants of property will not chose to come to a country whose form of government hangs but by a thread .. (finally), but the most powerful of all arguments is that nothing but independence, *i.e.*, a continental form of government, can keep the peace of the continent and preserve it inviolate from civil wars. I dread the event of a reconciliation with Britain now, as it is more than probably that it will be followed by a revolt ... the consequences of which may be far more fatal than all the malice of Britain.[39]

This was a very interesting passage; in it, Paine expressed the common conviction of most American patriots; *i.e.*, that the tyranny of the king was the reason that the colonies could not live under the government of Britain. Yet, in the last part of this passage Paine expressed an unconventional, and ultimately, a prescient fear: that within the separate colonies there existed a set of forces tending to drive them apart; only a government that was "continental," a government that was divorced from regional and sectional prejudices, could ensure that these forces would not drive the colonies to civil war. For a man the purpose of whose pamphlet was to rouse the colonies to the fever-pitch of war against the enemy, it is a startling admission indeed.

Thus, Paine laid out his main argument for rebellion: the tyranny of England presented a situation where further mediation of the crisis would be useless. There was nothing left to be gained by talking; the time for actin had arrived.

> The last cord (between England and America) is now broken ... As well can the lover forgive the ravisher of his mistress, as the continent forgive the murderers of Britain. The Almighty has implanted in us these inextinguishable feelings for good and wise purposes ... O ye that love mankind! Ye that dare oppose not only the tyranny but the tyrant, stand forth! Every spot of the old world is overrun with oppression. Freedom hath been hunted round the globe ... Europe regards her like a stranger, and England hath given her warning to depart. O receive the fugitive, and prepare in time an asylum for mankind.[40]

G. CONCLUSION

When Paine published his pamphlet, the declaration of independence that he so ardently desired was only seven months away. In the ten years that had passed between Richard Bland's essay and Paine's broadside, a large segment of the American population had been convinced by its political leaders that it was under the rule of a foreign tyrant whose action had given the colonies the right to revolt. Framing the argument for the most part in the context of the Rights of Englishmen presented the colonial theorists with a way to justify revolution: that is, they were only demanding the rights that were theirs as a product of their English birth. Yet, in their preoccupation with the Rights of Englishmen, the colonials were never hesitant to phrase their protests in the language that would justify rebellion should England be reluctant to grant them their rights. Indeed, in Jefferson's essay of 1774, the rights demanded sounded almost like the demand for complete self-government completely removed from the jurisdiction of the English king. Those demands were so extreme that one wonders if Jefferson and the other writers of his day were really concerned about securing their rights inside the British Empire, or if their real concern lay elsewhere: an America detached from the Empire and operating as a free and independent sovereign nation. Whatever their motivations, it is clear that in the ten year period between 1766 and 1776, the colonial leaders had moved from a position of conciliation to a position where armed resistance to the British was inevitable. The Continental Congress in July of 1776 was ready to produce the document that these writers had been preparing for over the space of the decade; a declaration that the colonies were a free and independent country, independent of the sovereignty of the king of the British Empire. The American people had been prepared legally, philosophically, and emotionally for this event by the political writers who, in their call for the respect for the rights of Englishmen, had instead laid the foundation for the government of a free and independent people.

CHAPTER IV ENDNOTES

1. This observation is not confined solely to British history; there is evidence of this phenomenon in United States history also. First and foremost was the existence of slavery in a land where "all me are created equal." This paradox deepens all the more when one reflects on the fact that the author of those words, Thomas Jefferson, was himself a slaveholder. Jefferson exhibited a peculiar attitude to the peculiar institution. He attacked the slave trade in both the essay referred to in Chapter II and in the Declaration of Independence, calling it "cruel war against human nature itself ... this piratical warfare, the opprobrium of infidel powers ... this execrable commerce..." (Jefferson, Thomas, *The Autobiography of Thomas Jefferson*, in *The Life and Selected Writings of Thomas Jefferson*, Random House, New York, New York, 1944, p. 25) In his only book, *Notes on the State of Virginia*, (*Selected Writings*, p. 256) Jefferson advances "as a suspicion only that blacks ... are inferior to the whites in the endowments of both body and mind ..."; yet his previous writings in the very same chapter of the book stamp him as an unrepentant racist: "They are more ardent after their female, but love seems with them to be more an eager desire, than a tender, delicate mixture of sentiment and sensation ... Their griefs are transient ... their existence appears to participate more of sensation than reflection ... in imagination, they are dull, tasteless, and anomalous ... they secrete less by the kidneys, and more by the glands of the skin, giving them a very strong and disagreeable odor ..." (*Notes*, in *Selected Writings*, pp. 256-257). On a more sinister note, Jefferson actually acted to perpetuate the institution of slavery when, on February 19, 1790, he transferred six families of Negro slaves to his daughter and son-in-law's ownership (Cunningham, Noble E., *In Pursuit of Reason, The Life of Thomas Jefferson*, Louisiana State University Press, Baton Rouge, Louisiana, 1987, p. 135). One author (Cunningham, p. 62) advances the theory that Jefferson's assertion that blacks were innately inferior to whites was a defense mechanism by which he justified keeping slaves for himself; certainly, that theory fits with Jefferson's long description above in his *Notes* of Negro family life; sentiments such as this certainly would have eased the psychological burden of the destruction of slave families by selling individual family members like so many cattle to different bidders. Be that as it may, the nation's struggle with slavery, a struggle personified by Jefferson, was made even more acute by the fact that the nation had been founded on the principle that all men are created equal.

   Further evidence of this mechanism by which the founding principles of a nation influence it policy can be seen in the United States experience with overseas possessions after the Spanish-American War. It would seem that any nation that was founded on the ideals of freedom and self-determination would be loath to acquire a colonial empire of its own; indeed, this was exactly the case in 1898. Contrary to the popular picture of the mad rush to declare war on Spain to begin an overseas empire of our own, the Congress acted very carefully, with deliberate purpose, in the debate on President McKinley's war message. The message reached Congress on April 11, 1898. Not until April 25 did the Congress pass the War resolution. During that two week period (specifically on April 19), the Congress unanimously passed the Teller Amendment, which forbade the United States from annexing Cuba after the war. Furthermore, after the war when it became clear that the Philippines were to fall into the custody of the Americans, many Americans voiced their misgivings about a nation with ideals pursuing a policy of imperialism. These were not just some vague philosophical rumblings; for a while, it appeared that the annexation of the

Philippines would cause the peace treaty to fail in the Senate. President McKinley, perhaps sincerely or perhaps only to sooth his conservative Republican conscience, offered the following rationale for the annexation: "One night late at night it came to me this way: ... that (the Philippines) were unfit for self government ... that there was nothing left for us to do but to take them all, and educate the Filipinos, and uplift and civilize and Christianize them, and by God's grace do the very best we could by them, as our fellow men for whom Christ also died ..." This anti-imperialistic attitude in the country was severe enough to cause the President to call upon strict party discipline in the Senate to assure passage. As it turned out, the treaty by which the United States acquired the islands passed the Senate on February 6, 1899, by the vote of 57-27, only one vote more than the two-thirds majority needed for passage. The Americans did not rush headlong into their first and last imperialistic adventure. The proceeded slowly, always shackled by the seemingly diametrically opposed forces of liberty and colonialism. Having entered the cutthroat world of international competition over colonies, the United States seemed eager to withdraw almost immediately: Congress authorized limited self-government for Puerto Rico by the Foraker Act of 1900; it ordered U.S. troops withdrawn from Cuba by the Platt Amendment of 1901 (reserving the right to intervene to maintain "law and order"); and it granted the Philippines the right of limited self-government by the Philippine Government Act of 1902. (The source for the facts from the above paragraph is Unger, Irwin, *The Vulnerable Years, The United States 1896-1917*, The Dryden Press, Hinsdale, Illinois, 1977, pp. 49-56.)

Thus, in the United States, the principles upon which the government was founded served to sharpen the debate about policies which existed in seeming contradiction to those principles. It did not, in fact, end those policies; slavery was to curse the country long after the death of Thomas Jefferson,and the United States did its best through the mechanism of armed intervention against the Philippine people to maintain its hold over that country. However, even though the policies were not changed immediately, the sentiments expressed while they were being debated did eventually carry the day. Slavery was exposed as the fraud it was, robbing a whole class of people of their fundamental rights through institutionalized racism. The Thirteenth Amendment ended slavery in 1865; the Fourteenth Amendment in 1868 was the first step on the road to establishing racial equality in the United States more in harmony with the true values on which the Republic was founded. The arguments of the early twentieth century, that America "... had lost her unique position as a potential leader in the progress of civilization ..." (Charles Eliot Norton, quoted in Unger, p. 54) were later revived by Presidents Woodrow Wilson, and Jimmy Carter, who attempted to shape the world in a distinctly American vision of human rights. America's experiment with colonialism produced for the people of the affected countries, in time, extraordinary benefits: Hawaii was granted statehood, Puerto Rico became an American commonwealth, and the Philippine Islands became the Republic of the Philippines in 1946. (Morgan, H. Wayne, *America's Road to Empire*, John Wiley and Sons, Inc., New York, New York, 1965, pp. 111-115.) So it was that in England in the latter half of the eighteenth century, the American plea for their rights as Englishmen did not immediately change England's policy towards the colonies; indeed, a war had to be fought to do that. But the arguments of the colonists who were merely repeating political doctrine that all Englishmen of the 1770s would have recognized as their own did have some effect. For example, note the defense of the American colonies in the House of Commons by William Pitt in 1766: "The Americans are the sons, not the bastards, of England ... (Americans) would be slaves if they had not enjoyed (a constitutional right to determine their own taxes) ... I rejoice that America has resisted (the Stamp Act) ... (the Americans) have been driven to madness by injustice ... the Stamp Act (should) be repealed absolutely, totally, and immediately." (Pitt quoted in Langguth, A.J., *Patriots*, Simon and Schuster, New

York, New York, 1988, pp. 84-85.) The arguments that Americans had inherited the birthright of English liberty had not been unanimously rejected by America's parent nation across the Atlantic.

2. For example, the colony of Virginia had long enjoyed a form of self government. The General Assembly of Virginia consisted of two Houses, the lower House called the House of Burgesses. This Assembly was supervised, however, by a royal governor, who had the power to dissolve it at will. However, in the years immediately preceding the Revolution, the Virginia assembly showed itself willing to disregard an order of the governor to disperse; in 1769 for example, in defiance of such an order, the assembly met and passed laws relating to a commercial warfare against England. Thus, as in Virginia, the tradition of independent self-government was strong throughout the colonies.

3. The following chronology provides the historical backdrop for the writings discussed in this chapter (1763-1776):

1763-British Lord of the Treasury, George Grenville, orders the enforcement of the Molasses Act of 1733, an import duty on molasses, in the colonies.

1764-The British amend the Sugar Act, an import duty on sugar, to make it apply to the colonies.

1765-British parliament passes the Stamp Act. Virginia General Assembly challenges the right of England to tax the colonies; Stamp Act Congress draws up a declaration of American rights and liberties.

1766-Stamp Act repealed. Declaratory Act, asserting Parliament's right to tax the colonies, passed.

1767-Parliament levies import taxes on the following commodities: tea, glass, paper, and dye. The New York state legislature is suspended for refusing to allow the quartering of British troops in private homes.

1768-British appoint a Secretary of State for the colonies. The Massachusetts state legislature is suspended for refusing to assist in the collection of taxes. Boston citizens refuse to quarter British troops in their homes.

1769-Privy council in Britain proposes the Parliament that all import duties be repealed, with the exception of the duty on tea. Parliament agrees. Virginia assembly dissolved for protesting the practice of holding trials for the colonists accused of treason in England.

1770-"Boston Massacre" occurs.

1772-Boston Assembly threatens secession. Samuel Adams takes the lead in forming Committees of Correspondence within the colonies, a first step to a concerted, coordinated colonial response to the British tax policy.

1773-The Boston Tea Party.

1774-The Port of Boston is closed. Virginia House of Burgesses calls for a Continental Congress. This congress passes a non-importation Act directed at British imports.

1775-Battle of Lexington begins the Revolutionary War. Second Continental Congress assembles in Philadelphia.

1776-Thomas Paine's pamphlet "Common Sense" appears. American Declaration of Independence adopted by the Second Continental Congress.

4. This chapter examines American political writings produced in the ten year period before the drafting of the Declaration of Independence. In addition to the concept of an equal application of the laws to English colonies, another equally important concept began to emerge in this period; *i.e.*, that Americans as a people were a nation distinct from Great

Britain and, therefore, should have the right of self-government. These two concepts utilized contradictory reasoning; the former rested on the assumption that the laws of England should apply equally to the colonies as to the mother county; the latter assumed that the laws of England had no force whatsoever in the colonies. Often, these contradictory assertions could be found in the same essay.

5. This article, whose author is unknown, is quoted in Hyneman, Charles S. (ed.), *American Political Writing During the Founding Era*, Liberty Press, Indianapolis, Indiana, 1983, pp. 62-63.

6. This concept of the maturation of the concept of liberty in the United States can be seen in a major area: the incorporation of the fundamental rights of the Bill of Rights into the due process clause of the fourteenth Amendment so as to make the Bill of Rights binding on the states. This process, which has matured through various fits and starts of American jurisprudence, clearly exemplifies the gradual evolution of a legal concept into something more than merely abstract legal philosophy. A short review of the due process clause's history here will clearly illustrate how the concept of liberty can come to mean more than freedom from arbitrary restraint; how, through time, it is expanded into the foundation of the relationship between a citizen and government.

Following the Civil War, in the process of Reconstruction, the Congress of the United States, in a nine year period from 1866 to 1875, passed more far-reaching civil rights legislation than has ever been passed in the history of the Republic. No fewer than three constitutional amendments and no fewer than six major civil rights/voting rights bills were enacted; after the Civil Rights Act of 1875, Congress was to pass no more legislation in this area for eighty-two years. (Berman, Harold J., *The Nature and Function of Law*, The Foundation Press, Mineola, New York, 1980, pp. 958-962.)

One of the most important developments that came out of that era was the "due process" clause of the Fourteenth Amendment: "... nor shall any state deprive any person of life, liberty, or property, without due process of law..." (U.S. Constitution. 14th Amendment, Section 1). That the immediate intent of that clause was to expand the states the prohibition already in place against the federal government in the Fifth Amendment's due process clause is clear, though there is still the argument that the motivation of the clause was economic; that is, the prohibition on states in regulation of corporations. (See Stampp, Kenneth M, *The Era of Reconstruction*, Random House, Inc., New York, New York, 1965, pp. 136-137.) Yet, that one clause of the Fourteenth Amendment has had a long, varied, and interesting history. Indeed, today, one of the most controversial topics in American jurisprudence is the over-application of this clause to facilitation "judicial activism." (See, for example, Bork, Robert H., "The Case Against Political Judging," *National Review*, September 8, 1989, for a good encapsulation of the argument that the due process clause is now being used to advance political aims of federal judges.) The federal courts after the passage of the Amendment were extremely reluctant to enforce it in the southern states to ensure the newly-granted Negro rights. (The Supreme Court case Plessy v. Ferguson, 163 U.S.537, 16 S.Ct. 1138, while brought under the equal protection clause of the 14th Amendment and not the due process clause, underscores dramatically the reluctance of the federal judiciary to encroach on questions of civil rights. The Court, rejecting the constitutional attack on the system of forced segregation in the South said, in part: "... If one race be inferior to the other socially, the constitution of the United States cannot put them on the same plane...") However reluctant the Court was in guaranteeing the liberty of the newly-freed blacks, it was vigorous about preventing the state regulation of corporations under the due process clause (corporations being "persons" in law). See Cox, Archibald, *The*

Court and the Constitution. Thus, the concept of "liberty" stood at the beginning of the twentieth century.

The due process clause could be used to thwart the state regulation of corporations; yet it could not be used in federal court to ensure basic justice for its citizens. The obvious inequities of this arrangement led the Supreme Court to modify the doctrine. The first major change occurred when the Court, in the face of enormous social pressures, began to lift the restriction on the state regulation of business. The process was a slow one, undertaken on a case-by-case basis, but soon the Court was recognizing the rights of both individual states and the Federal government to regulate businesses. (See Cox, pp. 156-173.) If the above-described retreat from the narrow definition of liberty was a deliberate process, the expansion of the due-process clause to protect individual liberties occurred with dizzying speed during the Warren Court of the sixties and early seventies. One by one, the liberties that the justices felt were fundamental to the American concept of government were incorporated into the due process clause and enforced on the states: exclusionary rule concerning illegally obtained evidence (Mapp v. Ohio, 1961); right to trial by jury (Duncan v. Louisiana, 1968); right to a speedy and public trial (Klopfer v. North Carolina); right to counsel (Escobedo v. Illinois, 1964, Miranda v. Arizona, 1966, and Gideon v. Wainwright, 1963). In all these cases, the concept of liberty was expanded to bring it more into focus with what we as Americans understand about our fundamental freedoms. (Oddo, Gilbert L, *Civil Liberties and the Supreme Court*, Goodyear Publishing Co., Santa Monica, California, 1979, is an excellent source and reference for the Warren Court's zest for incorporation.)

Thus, as the concept of liberty has matured in American jurisprudence in only two hundred years, the same maturation process concerning the idea of British "liberty" had occurred in the British Empire during the first five centuries that transpired between the signing of the Magna Carta and the American Revolution. This places the sentiments of the writer of the "Gazette" article in context; he is writing of a concept, "English liberty," that encompasses the very definition of British citizenship: the relationship of the British citizen to his government.

7. Article appearing in "Massachusetts Gazette," author unknown, March 6, 1766, quoted in Hyneman, (ed.), *Political Writings, op. cit.*, p. 63.

8. *Ibid.*, pp. 63-64.

9. *Ibid.*, p. 64.

10. *Ibid.*, pp. 64-65.

11. Bland, Richard, *An Inquiry Into the Rights of the British Colonies*, quoted in *Political Writings, op. cit.*, p. 68.

12. *Ibid.*, p. 68.

13. *Ibid.*, p. 69. This passage was inserted by Bland in his essay to explain the theory which he was attacking. Bland does not give the name of the author who advanced the theory of virtual representation. It was Thomas Whately, in a pamphlet called "The Regulations Lately Made," published in 1765, the year before Bland wrote his essay. Whately's pamphlet had been written in answer to the colonial protests over the Stamp Act.

14. *Ibid.*, p. 70.

15. *Ibid.*, p. 75.

16. Gifis, Stephen H., *Law Dictionary*, Barron's Educational Series, Inc., Woodbury, New York, 1975, p. 44. One of the principle characteristics of a compact of contract is "arm's length bargaining" between equals. Therefore, Bland's characterization of the relationship between the colonies and England connotates a relationship among equal nations, not a relationship based on the premise that the colonies were inferior to the British. For an excellent discussion on how the right to make contracts infers a type of social and political equality, see Foner, Eric, *Reconstruction*, Harper and Row, New York, New York, 1988. Even though Foner is writing in the context of the white southerner's reluctance to deal with black laborers through labor contracts because of the implied social equality of that system, it is an illuminating insight to the concept that the right to contract is a right shared among equals.

17. Bland, quoted in *Writings, op. cit.*, pp. 83-84.

18. *Ibid.*, p. 85.

19. For example, Thomas Jefferson, as late as 1774, two years before the Declaration of Independence, wrote an essay in which he argued colonial rights from the perspective of the rights of Englishmen.

20. Downer, Silas, *A Discourse ... on Liberty*, quoted in *Writings, op. cit.*, p. 99.

21. *Ibid.*, p. 99.

22. Jefferson, Thomas, *A Summary View of the Rights of British America*, in Peden, William (ed.), *The Life and Selected Writings of Thomas Jefferson*, Random House, New York, New York, 1944, p. 293.

23. *Ibid.*, p. 294.

24. *Ibid.*, p. 294.

25. *Ibid.*, pp. 294-295.

26. *Ibid.*, p. 299. Apropos this passage and Jefferson's ambiguous feelings on slavery discussed in the first endnote in this chapter, it is of interest to note here that Jefferson included in this essay as one of his grievances against the crown the fostering of the slave trade on the colonies; he did not confine his remarks solely to the matter of the slave trade; he spoke of slavery as well: "The abolition of domestic slavery is the greatest object of desire in those colonies, where it was, unhappily, introduced in their infant state." (*Writings of Jefferson, op. cit.*, p. 304.) Jefferson was to return to this theme two years later in his Declaration.

27. *Ibid.*, p. 310.

28. *Ibid.*, p. 311.

29. *Ibid.*, p. 311.

30. For example, Jefferson, writing in his autobiography about the relative calm of the period following the year 1769, bemoaned the fact that "... nothing of particular excitement occurring for a considerable time, our countrymen seemed to fall into a state of insensibility to our situation." Are those the words of a statesman working for a peaceful compromise, or the words of a revolutionary looking for the spark to incite the conflagration? As further proof that he was not really seeking conciliation within the framework of English rights (as he claimed to be doing), Jefferson recounts in his autobiography that the young radicals plotted to stir up the rebellious spirit among their countrymen, the older leaders being too willing to compromise and less willing to take risks: "Not thinking our old and leading members (of the legislature) up to the point of forwardness and zeal which the times required, (we) agreed to meet in the evening ... to consult on the state of things. We were all sensible that the most urgent of all measures was that of coming to an understanding with all the other colonies, to consider the British claims as a common cause to all, and to produce a unity of action." (Both of the above quotes come from Jefferson, Thomas, *The Autobiography of Thomas Jefferson,* located in *Writings of Jefferson, op. cit.,* p. 7.) This passage goes on to explain how these young state legislators, in a period of what they perceived as calm, plotted for concerted colonial action against British rule in the colonies. These two passages certainly go far in making the case that Jefferson and some of the other leading patriots, at least by 1774, when they were still demanding their British rights, had, in actuality, no intention of compromising within the framework of British sovereignty; yet desired nothing less than a total break with the British government.

31. Jefferson, for example, was a trained lawyer; Bland was a college-educated (College of William and Mary) Virginian who served in the state legislature from 1742-1775.

32. Kuklick, Bruce (ed.), *The Political Writings of Thomas Paine,* Cambridge University Press, New York, New York, 1989, pp. vii-xvii.

33. The effect of *Common Sense,* by Paine, cannot be overestimated. The pamphlet sold over 100,000 copies when it was published n 1776, an incredible number of copies for that time. Paine has long been considered by many historians as being single-handedly responsible for galvanizing the public to action at the start of the Revolution. See Kuklick, *op. cit.,* p. viii, for a discussion on the tremendous effect Paine had on galvanizing public opinion on the beginning of the Revolutionary War.

34. Paine, Thomas, *Common Sense,* located in Kukuck (ed.), *op. cit.,* p. 16.

35. *Ibid.,* pp. 15-16.

36. *Ibid.,* p. 18.

37. *Ibid.,* p. 20.

38. *Ibid.,* p. 22.

39. *Ibid.,* p. 24-25.

40. *Ibid.,* p. 30.

CHAPTER V. THE STATES SUPREME GOVERNMENT UNDER THE ARTICLES OF CONFEDERATION

A. INTRODUCTION

It is hard to imagine a nation that showed less of a proclivity for accepting a national government than that of the American colonies in the decade of the 1770s. America at that time was divided along several distinct lines of demarcation. First, and foremost, was the matter of geography. In 1767, in response to a quarrel between Maryland and Pennsylvania as to the latter's southern border, two surveyors, Jeremiah Dixon and Charles Mason, drew a line of latitude marking the boundary between the two antagonists. This boundary line, ostensibly drawn to separate two colonies, actually separated two worlds: the agrarian, slaveholding South and the mercantilistic, free-labor North.[1] The South was further divided by geographical features; the fall line, running due south from Baltimore, Maryland to Richmond, Virginia, sweeping in a southwest arc from Richmond through Raleigh, North Carolina; Columbia, South Carolina; Augusta, Macon, and Columbus, Georgia; then slicing straight through the middle of Alabama from Columbus to Tuscaloosa, Alabama; divided the old-money eastern Tidewater aristocracy from the yeoman farmer of the fertile plains of the southern Piedmont. Further west, the Blue Ridge and Smoky mountain ranges of Virginia, North Carolina, and Tennessee divided the Piedmont from the independent-minded residents of these Appalachian mountain chains. These three regions of the South gave rise to three distinct types of southerners; these three types of southerners, in turn, harbored distinct, often contradictory, political philosophies.[2]

In addition to the political differences driven by geographical considerations were those differences driven by economic and social factors. There seemed to be a consensus among the wealthy of both the North and South that they were the only ones to whom political power could

be entrusted; this notion was certainly not unique to the American experience; yet it seemed somewhat hypocritical for the leaders of a nation founded on the principle of equality to insist on stringent property requirement for the franchise.[3] This political friction was frequently augmented by a geographical conflict, as the old-money easterners labored long and hard to ensure that fast-growing western counties were under-represented in the state legislatures that were the old-guard's depository of power.[4] Thus, as the American colonies emerged victorious from its Revolutionary War, their leaders were no strangers to political conflict; as these men struggled to form the colonies into a nation, these regional and state-wide conflicts were to be magnified onto a national scale. As such, the difficulties that the political factions of each state had in sharing power equitably among its citizens were transformed into difficulties that each state had in surrendering a part of its sovereignty to a truly national government. After 1781, and the temporary respite that a war for survival had given to this state-national supremacy argument, this argument was to flare anew. It was in this very argument where one finds the root difficulty encountered by the founders as they labored to craft a nation. Most sectional and political objections to a national government eventually proved themselves amenable to compromise; even those that would at first blush seem to be the ones that would make their proponents the most intractable were among those that were, at length, settled.[5] Among the controversies that sprang up along the tortuous path from revolution to Constitution, it was the question of state versus federal sovereignty that was the least satisfactorily resolved; this is indicative of how difficult it was for the various states to relinquish sovereignty to a national government; eventually, this question, placed against the political backdrop of the volatile 1850s, mixed in an explosive combination with the passions of slavery, led to the attempt to dissolve the federal Union. This chapter examines the evolution of the theory of state sovereignty that was used as the principle argument by southern political theorists to justify secession in 1860.

B. THE DICKENSON DRAFT OF THE ARTICLES OF CONFEDERATION:

On November 17, 1777, the Congress of the United States adopted and sent to the states for ratification the Articles of Confederation. The government occasioned by this remarkable document has long been belittled by historians as weak and ineffective; indeed, the period between the Revolutionary War and the swearing in of George Washington as the first president under the Constitution of 1787 is often treated as a void; a period of inefficient national government and recalcitrant state legislatures. That the United States in this period did suffer under a weak central government is clear; as is the propensity of American political leaders in the mid-1780s to refer to this time as a time of "crisis"[6]; yet, the Confederation passed the ultimate test of effectiveness: the government was able to fight and win a major war under its terms of agreement. (To be historically accurate, it must be noted that the Articles of Confederation proper were not actually ratified by all the colonies until March 1, 1781, in the last year of the major fighting in the Revolutionary War. However, the system of government used to fight the war was remarkably similar to the system of government that emerged under the Confederation; *viz.*, a weak national Congress with the true power to be found in the state legislatures. Furthermore, it can be argued that the war was not a true measure of the Articles effectiveness; all states, especially the ones under the threat of British invasion at the time, were more than willing to sacrifice a point of principle to strengthen the national government when deemed necessary. It can be argued that the true test of the Articles occurred when all the artificial cooperation between state-rights advocates and nationalists generated by the need to survive a war evaporated at the coming of peace, and when the true inefficiencies of the system were manifested.) In addition, it was a carefully crafted document which spoke directly to the question of state versus national sovereignty. The Articles of Confederation can be viewed, therefore, not as a failed experiment; rather, they were an experiment that produced preliminary results that were used by later

theorists in refining the theory of states' rights to construct a government able to govern the states and the people more effectively.

The first draft of the Articles of Confederation was drawn up by a congressional committee headed by John Dickenson of Pennsylvania.[7] The Dickenson draft was reported to Congress on July 12, 1776. An examination of this document in relation to the one that was actually passed by the Congress sixteen months later reveals that, in 1776, the delegates to the Continental Congress were more than willing to sacrifice a large portion of their own state's sovereignty to that of a national government. Article 1 of the Dickenson draft proclaimed: "The name of this Confederacy shall be The United States of America."[8] Article 2 is a sweeping statement of national power: "The colonies unite themselves so as never to be divided by any act whatever, and hereby ... enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare... "[9] The third article contained a qualified endorsement of a limited state sovereignty over its internal affairs: "Each colony shall retain and enjoy as much of its present laws, rights, and customs as it sees fit, and reserves to itself the sole and exclusive regulation ... in all matters that shall not interfere with the Articles of this Confederation."[10]

These first three articles of the Dickenson draft contained some remarkable concepts. The second article is interesting in that the defense of liberty was placed under the jurisdiction of the federal Congress, not the several states. This concept, that the states were not to be the guardians of liberty, was certainly a most conservative one.[11] The clause that the federal Congress was to be the instrument of ensuring the mutual and general welfare of the nation certainly assumed a broad scope of federal power at the expense of the states.[12] The third article, in its less than sweeping endorsement of state sovereignty, also seemed to put a limit on the power of the states. Specifically, "present laws and customs", were to be allowed; what of future laws?[13] Also, state regulation of internal matters was endorsed, but an obvious question then arose: who determined if a problem was internal? According to the Dickenson draft, an internal matter was one that did

not interfere with the Articles of Confederation. That language seems to imply that it would be the federal Congress, not the states, that would determine if a matter fell under federal or state jurisdiction.

Article four of the Dickenson draft was designed to ensure that foreign relations would be carried out by the federal government, and not by individual states.[14] "No colony or colonies ... shall enter into any treaty ... with ... any foreign prince or state... "[15] The next article is interesting in that it spoke to the fear that individual colonies will ally themselves by treaty against the other colonies. This practice is forbidden absent the consent of the federal Congress.[16] An important power was granted to the separate states in the eighth article, which allowed a state to lay duties on its imports and exports[17]. (This power was expressly denied the states in the constitution of 1787[18]). The tenth article of the Dickenson draft reserved to the state government the right to appoint the commissioned officers in the army when called into service for the common defense; however, the right to appoint general officers was retained by Congress.

C. THE FEDERAL CHARACTER OF THE DICKENSON DRAFT

Through the first ten articles, the Dickenson draft appeared to be a truly national document. Sweeping power was granted to the federal government to safeguard the liberties of the states and to provide for their general welfare; the concept of state sovereignty was subtly limited, and the states were subordinated to the federal Congress in matters of foreign policy. A substantial power was granted to the states to regulate their own commerce; yet, on the whole, through the first ten articles, the draft was national in scope. It was in the eleventh article, however, where the draft exhibited its fateful weakness. The taxes imposed upon each colony were to be determined by the number of inhabitants of each state, that number to be determined every three years; yet, "...The taxes for paying that proportion shall be laid and levied by the authority and the direction of the legislatures of the several colonies, within the time agreed upon by the United States, in Congress assembled.[19] Thus, the federal Congress surrendered a major power: the power to levy taxes

directly upon the citizens of the nation. The power to tax was in the hands of the states; Congress could only ask for the money.

Individual states were granted another important power in the sixteenth article. Delegates to the federal Congress were to be appointed by the state legislatures. Furthermore, this article granted to the states the power to "...respectively recall them or any of them at any time... and to send new delegates in their stead ... "[20] This article guaranteed that the representatives of the states in the federal Congress would be no more than the mouthpieces of the several state legislatures. It would be impossible for a delegate to a congress thus constituted to take a national view on matters when he was subject to recall from his state legislature at any time during his term. Furthermore, under the terms of this article, delegates were to stand for reappointment annually.[21] The effect of these two clauses, one allowing recall and the other calling for annual appointment, was hardly one that allowed for nationalistic sentiment to flourish in the halls of Congress. Thus, the draft, containing as it did clauses which augmented national power and clauses which strengthened state power, called for a government which was truly federal in nature.

D. CONSERVATIVES VERSUS RADICALS - THE STRUGGLE FOR CONGRESSIONAL PASSAGE

After this draft was reported to Congress on the date mentioned above, it was debated and amended over the space of the next sixteen months. There were three main areas of contention; one was the question of federal versus state sovereignty.[22] The federal power, as weak as it was, was deemed to be too great; the Articles of Confederation that were finally submitted to the states on November 17, 1777, had significantly changed the nationalistic provisions of the Dickenson draft. What emerged was a form a government in which the states, without question, were supreme *vis-a-vis* the federal government.

The debate in Congress over the question of sovereignty pitted two groups against one another: the conservatives, who believed the ultimate power should rest with the federal Congress; and the radicals, to whom the idea of centralization of power was anathema. As the break with England became inevitable, the radical philosophy grew ascendant; the Declaration of Independence was a radical document. However, as the euphoria of revolution faded, and the Congress turned towards theories of government, a distinct split grew between these two groups. Radicals believed in the rights of man; they believed in the scientific philosophy of the enlightenment.[23] The conservatives dismissed the idea that reason alone was the ultimate guide. This sentiment was clearly expressed in the federal constitutional convention of 1787 by John Dickenson, the prominent conservative who was the author of the first draft of the Articles of Confederation, in a remarkable statement dismissing the process of reason held so sacrosanct by the radicals such as Jefferson. In responding to James Madison on the question of money bills originating in the House of Representatives, Dickenson said: "Experience must be our only guide. Reason may mislead us ... Accidents probably produced (the admirable portions of the British constitution), and experience has given sanction to them."[24] No more blunt dismissal of the process of reason could have been uttered. This idea, that it was not the process of reason discerning the rights of man, but mere accident sanctioned only by long experience, that was responsible for the rights enjoyed by the American people created a chasm across which the radicals and conservatives eyed each other in the summer of 1776.[25]

E. THE RADICALS TRIUMPHANT IN CONGRESS - THE AMENDMENT OF THE DICKENSON DRAFT

The Articles of Confederation as they emerged from, Congress in November of 1777 were a complete triumph for the radicals. Compare the second article of the amended version to the Dickenson original. Where the second article of the first draft was one of the most nationalist in the sweeping authority granted to the federal Congress to protect the liberties of the citizens of

the respective states, the new final draft contained the clause: "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."[26] The powers denied to the states under the Dickenson draft were substantially unchanged, yet the theory of sovereignty had undergone a radical transformation in the final draft. Whereas under the Dickenson draft the colonies were given only the power to make laws which did not interfere with the Confederacy, no such qualifying clause existed in the final draft. Under the Dickenson article, it can be inferred that the federal Congress had the "elastic" power to legislate in areas outside of the specific clauses of the document, and the states were to be constrained exclusively to the powers granted them expressly. In the final draft, it was the federal Congress which was placed under such a constraint, with the states left free to legislate in all areas in which they claimed jurisdiction. This rendered the federal government powerless in the face of the states, a mere instrument of the will of thirteen separate sovereigns, without even the power to levy a tax on the citizens of the nation in the middle of a war for survival. The radicals had emerged triumphant on the question of state sovereignty.

F. GOVERNMENT UNDER THE ARTICLES OF CONFEDERATION

The next step in the evolution of political thought on the concept of state-federal supremacy occurred in the summer of 1787. From March 1, 1781, to that summer mentioned above, however, the United States was governed under its first constitution, the Articles of Confederation. Under this constitution, the states reigned supreme as the entities of dominant sovereignty. It would take a decade of perceived crises to drive the nation's political theorists into another, technically extra-legal convention in an attempt to revise the Articles. The document which emerged from that Constitutional Convention owes much to the Articles of Confederation, not so much for its theory of state sovereignty, but rather for the experience gained in six years under a government

guided by radical principles of political theory. By 1787, the conservatives would stand ready to effect a change.

For a period of inaction, delay, and lethargy in the federal government, one need look no further than the years immediately following the Revolutionary War. Even some of the radicals, under whose philosophy the Confederation had been established, seemed embarrassed by the weakness of the federal Congress.[27] Thomas Jefferson recorded that when the Treaty of Paris, concluded with Britain at the end of the Revolutionary War, arrived in Congress for ratification on September 3, 1783, there were only seven states represented. The Articles calling for the approval of nine states for the ratification of treaties, a quorum was not present. Then followed the ridiculous spectacle of the Congress of the United States debating for three and one-half months whether the Congress could ratify with only seven states present; in Jefferson's words: "Our body (the Congress) was little numerous, but very contentious."[28] Finally, the appearance of the delegations from two states, Connecticut and South Carolina, on January 14, 1784, produced the quorum necessary; the treaty was immediately ratified by a unanimous vote. Thus was the war with England concluded: with the Congress of the United States sending out frantic messages to the governors of several states asking for the states' Congressional delegations to come to Annapolis, Maryland (where the Congress was sitting) to ratify the treaty.[29]

The events that occurred in American history between 1785 and 1787 demonstrated the inability of the Confederation Congress to deal with national problems within a framework of limited national government. As difficult as it would be for contemporary Americans, used to a strong national government, to imagine a federal government with such a limited usefulness, it would be just as difficult for them to imagine how painful it must have been for a eighteenth century American nationalist to experience such a government. During the first three months of 1785, a year in which the federal government faced crises in the public debt, the policy regulating public lands, and the regulation of interstate commerce, the federal Congress could not muster a quorum to do business.[30] Two years earlier, the Congress had sent three amendments to the

Articles to the various states, requesting the power to lay taxes on land, to requisition money from the states, and to lay duties on imports. The first two had no chance of passage; regarding the latter, ten state legislatures had passed it; the Congress was still waiting to hear from the legislatures of New York, Georgia, and Rhode Island. In reaction to the fiscal crisis, the Congress appointed a three-member Board of Treasury: Walter Livingston, a lukewarm nationalist from New York; and Samuel Osgood (Massachusetts) and Arthur Lee (Virginia) two members of the republican philosophy whose stated purpose was to use their position on the Board to weaken its potential as an agency of national power.[31] Congress seemed bent on the destruction of its already weakened credibility.

The powerlessness of Congress was demonstrated further demonstrated by the Mount Vernon conference, which completed its work on March 28, 1785. This conference, held by representatives of Virginia and Maryland to iron out problems of interstate commerce between the two states, was clearly extra-legal: article 9 of the Articles of Confederation stated: "The United States, in Congress assembled, shall be the last resort ... in all disputes and differences ... that hereafter may arise between two or more states concerning boundary, jurisdiction, or any cause whatever ... "[32] In further contradiction of the Articles of Confederation, which prohibited the states "...from entering into any treaty, confederation, alliance, whatever, between them, without the consent of Congress... "[33] and prohibited the states "(from keeping) vessels of war in times of peace, except such number only as shall be determined by the ... Congress ... "[34], the conference recommended the formation of a state navy to patrol the Chesapeake Bay and other state waters.[35] This flagrant violation of the Articles evoked no protest from Congress; indeed, between October 1, 1785 and April 30, 1786, the presence of nine states (the minimum required to transact any serious business[36]) was obtained for only three days.[37]

In January of 1786, the Congress was informed about its three outstanding revenue amendments to the Articles of Confederation; Rhode Island's state legislature had passed the amendment granting the Congress the right to pass import duties. In March of the same year, the

Georgia state legislature also passed the amendment, leaving New York the lone holdout. The other two amendments appeared dead; in addition, New Jersey had rejected outright the latest congressional requisition. In action on another front, nine state legislatures had responded to the call for a national commercial convention to be held in Annapolis, Maryland. As hopes for cooperation between the states soared in response to this national convention, they were dashed by word out of New York that the state legislature had failed to ratify unconditionally the import duty amendment. Congress still had no power to force the states to provide it the revenue needed to run the country.[38]

G. THE ANNAPOLIS CONVENTION AND SHAYS REBELLION

On the eleventh of September, 1786, the convention at Annapolis met. It was able to transact no business because, *mirabile dictu*, it had no quorum.[39] The convention then dissolved, but not before one of its members, Alexander Hamilton, penned a resolution to be sent to the Congress, calling for a general convention to rectify the weaknesses of the Articles of Confederation. The Congress referred the proposal to a committee of thirteen, which referred it to a committee of three, which Congress then neglected to appoint.[40] However, the apathy in Congress was soon to be overcome by events in Massachusetts, which would provide the impetus for the reform of the government.

In studying the reason why events occur in the manner they do, it is very easy to point to a single event as the cause of a major happening. Even though the root causes of events are seldom so simple that they can be reduced down to one simple factor, oftentimes it is one single factor that has the effect of bringing about monumental change. For example, there is no one that will say that the assassination of the Austrian archduke Franz Ferdinand would have, if it had occurred in a historical vacuum, plunged the world into war. Yet, while rejecting this simple explanation, it is easy to overlook the fact that it was this event that did provide the spark for war. In a similar fashion, it is easy to dismiss the importance of "Common Sense" as a factor in

starting the Revolutionary War; yet it was this pamphlet that moved the people to war. It is easy to trace the events in the United States from the ratification of the Articles of Confederation to the summer of 1787, and explain the emotions that moved the United States to alter its constitution: the frustration of the nationalists, the obstinacy of the states, the weakness of the Congress. In the midst of the causes, however, one even occurred that provided the spark for reform: Shays Rebellion.

That Shays Rebellion was a phenomenon marked by a few thousand fairly well-trained Massachusetts westerners who really had no idea of their ultimate goal is not important. What was important was the panic it engendered throughout the nation. What the people heard, largely through a letter from Henry Knox, the Superintendent of War of the United States, to George Washington, was that 15,000 rebels were descending on eastern Massachusetts with a view to confiscate and redistribute private property.[41] Apparently, nothing acted like the threat to private property to galvanize the state legislatures to action. During the course of the rebellion (which was easily dispersed by the Massachusetts militia[42]), fully seven states[43], acting even after Congress had refused to call a constitutional convention, voted to send delegates to one regardless of the fact it had not been legally constituted. Finally, on February 21, 1787, Congress,in its last gasp before extinction, called for a convention to meet to revise the Articles of Confederation[44].

H. CONCLUSION

Thus, the government founded on the radical proposition of state supremacy at the expense of national power was to die a quiet death, unmourned by anyone who had any nationalistic leanings. The new government which would emerge would seek to incorporate a philosophy that elevated national power over the independent sovereignty of the states. However, as the anti-federalist movement would demonstrate, the radical idea of limited central power would die hard, and the new nation would struggle in its early years as it sought to reconcile the two theories in order to produce a vigorous central government with as little encroachment as possible

against state or individual liberties. However, the augmented power of the federal government would cause great concern to many political theorists; these temporarily dormant concerns, far from being completely resolved by the Constitutional Convention of 1787, would awaken in the mid-nineteenth century, and propel the Union towards destruction. Thus, the nation entered this new period of hope with several fundamental problems unresolved; (chief among them was the relationship that existed between the federal government, the states, and the people. In that regard, the Constitution that emerged from the Pennsylvania State House in the fall of 1787 was little improvement over the Articles of Confederation, in that this critical question, though more sharply defined, was not fully addressed.[45]

CHAPTER V ENDNOTES

1. It is perhaps an oversimplification to state that the South was agrarian and the North was mercantilistic, especially in the era under the Articles of Confederation. However, there is no doubt that in the nineteenth century, the South's major output was agricultural in nature. That the North was mercantilistic in nature can be seen from the facts that: 1) northern merchants were the main go-betweens in the cotton trade between the South and Europe, receiving (it was claimed by southerners) 40 cents from every dollar obtained from the sale of cotton, and 2) a far smaller percentage of goods were imported through southern ports than were exported through them; therefore, the imported goods bought by southerners were, in large measure, imported through northern middlemen. For example, in 1851, the southern port of Mobile, Alabama exported $18 million of produce, yet imported only $413,000 worth of goods. These characteristics of the cotton trade show that the North was, by and large, the mercantilistic section of the country. (See Eaton, Clement, *A History of the Old South,* Macmillian Publishing Company, New York, New York, 1975, pp. 418-419). That the South was slaveholding and the North was free-labor can be seen from the fact that by the census of 1790, the vast majority of slaves in the United States were held in bondage in the southern states; additionally, all states in the North had, by the turn of the nineteenth century, taken steps to outlaw slavery by court decisions, legislative emancipation, or state constitutional provisions. (Foner, Eric, *A House Divided,* W.W. Norton and Company, New York, NY, 1990, pp. 5-6.)

2. The estrangement between the Tidewater and Piedmont sections of a southern state was demonstrated in North Carolina in 1771. The citizens of the Piedmont in the Tarheel state held many grievances against the eastern members of their state: underrepresentation in the legislature, taxation to support the established Anglican Church, and the absorption of the best western lands by eastern speculators. An armed band of these western malcontents, who styled themselves the "Regulators," began to harass the officers of the courts in the western counties of the colony. In May of 1771, the Governor of North Carolina, William Tyron, personally led an army against the regulators. In the Battle of Alamence Courthouse, though outnumbered two to one, the governor routed the regulators and put an end to the movement. (See Jensen, Merrill, *The Articles of Confederation,* The University of Wisconsin Press, Madison, Wisconsin, pp.25-26.) Though the Regulators were unsuccessful, their revolt demonstrated the depth of ill will that existed between the eastern Tidewater and the western Piedmont. The animosity that existed between the mountain and eastern sections of the South was demonstrated during the Civil War when the mountainous region of Virginia, opposed to secession from the Union, seceded from the state of Virginia and was admitted to the Union as the new state of West Virginia in 1863. Interestingly, these southern intrasectional rivalries survived the Civil War and were carried well into the twentieth century. In the area of legislative apportionment inequalities, it is interesting to note that the two major cases decided by the Supreme Court originated from the South: Baker v. Carr from Tennessee in March of 1962, and Reynolds v. Sims from Alabama in June of 1964. In addition to these landmark decisions, unequal apportionment in five other states had been brought to the Court's attention; three of these states (Maryland, Virginia, and Delaware) were below the Mason-Dixon line. While the apportionment was not based on maintaining eastern power over the western part of the state as was the norm in colonial

times (the dispute in the 1960s was mainly rural vs. urban areas), these cases to point to the fact that unequal apportionment of the legislature based on maintaining existing power blocs was not a phenomenon that died easily in the South. (See Cortner, Richard C., *The Apportionment Cases,* University of Tennessee Press, Knoxville, TN, 1970, for an excellent explanation of the underlying causes and legal resolution of the major apportionment cases of the 1960s.)

3. For example, Pennsylvania in 1775 had perhaps the most stringent voting requirements in the country: the franchise was granted only to men who possessed fifty pounds of personal property or a freehold. These restrictions had the effect of allowing only 335 of 3,452 taxable males in the city of Philadelphia to vote. As the leaders of the Revolution in Pennsylvania began demonstrating against "no taxation without representation," they unwittingly gave impetus to a movement that eventually overthrew the oligarchical state government and replaced it with one of the most liberal state governments the colonies had ever seen. (Jensen, Merrill, *The Articles of Confederation,* The University of Wisconsin Press, Madison, Wisconsin, 1940, pp.17-19.). This was not the first time American political rhetoric was to collide headlong with American political reality; and these collisions would, in turn, provide an impetus for effecting a positive change in American political institutions. (A good example of this revolutionary spirit causing a moral change of heart was the speech of George Mason, a Virginian, against slavery in the Constitutional Convention of 1787. Calling the slave trade "...this infernal traffic," Mason went on to attack not only the slave trade, but slavery itself: "Every master of slaves is born a petty tyrant. (Slaves) bring the judgement of heaven on a country. As nations cannot be rewarded or punished in the next world, they must be in this one. ... Providence (will) punish our national sins with national calamities ... the general government should have the power to prevent the increase of slavery." (Madison, James, *Notes of the Debates in the Federal Convention of 1787,* Ohio University Press, Columbus, Ohio, 1966. See debates for August 22, 1787). This speech shows how the ideas of equality fostered by the Revolution could affect even a slave-owning southerner.

4. Merrill, chapter two, *The Internal Revolution,* pp.16-53, gives a summary of the inequities of representation experienced by the colonists in the years prior to the Revolution.

5. The two major "compromises" of the Convention settled two major disputes. The "three-fifths" compromise settled the issue of counting slaves for taxation and representation; the "great compromise" settled the dispute about the basis for representation in the federal Congress: the House of Representatives was to be apportioned on the basis of population, while the Senate was to consist of two members from each state. See Madison's *Notes* for the contentiousness of the debates on these subjects, and the threatened withdrawal from the convention by state delegations over their resolution.

6. There has been an interesting evolution in the interpretation of the "crisis" in the American political scene during the government under the Confederation. That is, was the period from 1781-1787 really a crisis for America, precipitating the Constitution? Or was the "crisis" merely contrived for the purposes of creating a stronger nation government to check the states? The accepted wisdom in the nineteenth century was that the founding fathers were sacrosanct; the Constitution was seen as divinely inspired; to even a man such as George Washington, a man hardly given to flights of religious fancy, the drafting and ratification of the Constitution "...seemed little short of a miracle ... " (Bowen, Catherine, *Miracle at Philadelphia,* Little, Brown and Company, New York, NY, 1966. The quote from Washington

appears on the inside front cover of the book.). Historians writing about the period contributed to the "divine inspiration" theory; George Bancroft and John Fiske believed the document inspired by the scriptures and one of the most remarkable achievements of man. The title of Fisk's book, *The Critical Period of American History,* leaves no doubt as to the author's feelings that the Constitution, divinely inspired, arrived on the scene just in time to prevent a major national catastrophe. Thus, the theory of the Constitution as *deus ex machina* in the was well-entrenched by the beginning of the twentieth century. In his landmark book, An *Economic Interpretation of the Constitution,* published in 1913, Charles Beard proposed the heretical notion that the canonized framers were, in actuality, not divinely led demigods but grasping, greedy politicians: "...men whose property interests were directly at stake... " in the formation of a strong national government. (This evolution of thought about the Constitution comes from McDonald, Forrest, *E Pluribus Unum,* Liberty Press, Indianapolis, IN, 1979, pp. 17-27. The tendency of the political generation to venerate the founders is covered well in Forgie, George B., *Patricide in the House Divided,* W.W. Norton and Company, 1979.). As usually is the case in historical disputes about the motivations of a large legislative body, the exaggerated extremes of motivation assigned to the group in Philadelphia in 1787 as a whole, in actuality, probably applied to a distinct minority; the motivations of the vast majority probably fell somewhere in the middle. Thus, historians today lean somewhat towards the more traditional interpretation, with the important qualifier that the delegates to the Convention were indeed politicians, and as such were not above looking out for their own self interests. Two modern books about the subject, Forrest McDonald's *E Pluribus Unum* and Catherine Bowen's *Miracle at Philadelphia,* show this more balanced approach. Though Bowen's book at times leans more heavily towards the traditional approach (see the word *I'miraclell* in the title) and McDonald seems to delight in debunking the myth of the founders as demigods by revealing their all-too-human weaknesses, both books present the contemporary interpretation described above.

Thus, calling the period from 1781-1787 a "crisis" has been in favor, has fallen out of favor, and now seems to be back in favor again. That it was a crisis for the conservative nationalists who yearned for a strong national government is not debatable; whether the government under the Articles of Confederation had led the nation into a legitimate crisis is.

7. The other members of the committee were Josiah Bartlett (New Hampshire); Samuel Adams (Massachusetts); Stephen Hopkins (Rhode Island); Roger Sherman (Connecticut); Robert Livingston (New York); Francis Hopkinson (New Jersey); Thomas McKean (Delaware); Thomas Stone (Maryland); Thomas Nelson (Virginia); Joseph Hewes (North Carolina); Edward Rutledge (South Carolina); and Button Gwinnet (Georgia). (Jensen, appendix 1, p.1). Interestingly, Dickenson, the major player in the committee, was not a radical; he was a conservative who had originally opposed the Declaration of Independence. In his autobiography, Thomas Jefferson recorded that when he presented the first draft of the Declaration to the Congress: "...It was too strong for Mr. Dickenson. He still retained the hope of reconciliation with the mother country and was unwilling it should be lessened by offensive statements." Furthermore, Jefferson recorded that Dickenson was the one chosen by Congress to draft a petition to the king in the hope of forestalling the move towards independence. (Jefferson Autobiography, *op. cit.,* p.13).

8. Article I, *Dickenson Draft of the Articles of Confederation,* located in Jensen, Appendix 1.

9. *Ibid.,* appendix 1.

10. *Ibid.*, appendix 1.

11. The distinction between "radical" and "conservative" as those terms are applied to American politicians in the post Revolutionary war era is covered in depth in McDonald, Forrest, *E Pluribus Unum, op. cit.*, chapter 1. Basically, the origins of the two groups stem from the period immediately prior to the Revolutionary War; the radicals believed that the war should be undertaken immediately, before the process of creating an American national government was complete; the conservatives believed it would be simply inviting disaster to take such a precipitous step prior to the formation of a central government. After the war, the division between the groups remained, with the conservatives still calling for a national government, and the radicals proposing a federal government with few major powers over the states. Fundamentally, it was a debate over the locus of sovereignty in the nation; the radicals felt more secure with a decentralized sovereignty, spread evenly over the thirteen separate state governments. The conservatives, however, still retained their hope for a strong central government. Interestingly, this conservative/radical split cut across sectional lines in the 1780s; each group had its northern and southern wing. McDonald, in addition to describing the political philosophy of the two groups, provides interesting insights into the moral foundations of the two groups. The radicals were the children of the enlightenment, wedded to the concept of reason at the expense of religious sentimentality. The nationalists, on the other hand, were suspicious of reason and absolutely convinced that men were ruled by avarice and passion. Thus, Alexander Hamilton, a nationalist, writing of the "reason" that every radical held so dear, could casually dismiss it as "a great source of error." (McDonald, p.34) John Dickenson, whose committee prepared the first draft of the Articles, was a conservative; thus, the concept alluded to, that the states were not the ultimate guardians of liberty, is here characterized as a conservative one.

12. As it turned out, this concept of the "general welfare" being the responsibility of the federal Congress, and thus enlarging the power of the central government, was to come to haunt the radicals under the government of the Constitution of 1787. In February of 1791, the Congress passed and sent to President Washington a bill calling for the chartering of as National Bank. Washington asked Thomas Jefferson, a radical; and Alexander Hamilton, a nationalist; for their opinions as to its constitutionality. Their expositions are as clear a picture as one can get over this central authority question: what exactly is the nature of the federal government under the Constitution? Jefferson advanced the classic radical argument: the Congress is given the power "To lay and collect taxes ... to ... provide for the general welfare of the United States... " (*U.S. Constitution*, article I, section 8). Jefferson argued that this clause be read literally: "(Congress is) not to do anything (it) pleases to provide for the general welfare, but only to lay taxes." Since "laying taxes" was not equivalent to chartering a bank, the bank must, therefore, be unconstitutional. Jefferson saw a dangerous precedent in such a broad interpretation of the general welfare clause. Washington's Secretary of the Treasury, Alexander Hamilton, a strong nationalist, argued for a broad reading of the powers granted the Congress. He wrote: "...every power vested in a government is in its nature sovereign and includes ... a right to employ all means requisite and ... applicable to the attainment of the ends of such power; and which are not precluded by restrictions ... specified in the constitution." Note the differences in the approach of the radical and the nationalist. The radical (Jefferson) quoted the clause of the Constitution to which he was referring, and sought, by a literal reading of the clause, to prove that the Congress was not granted the power which it was claiming. The nationalist (Hamilton) did not even refer to the specific clause in question, but instead elaborated on

the meaning of the sovereign power of the government, claiming the powers granted to the Congress in Article I section 8 are not all-inclusive; they are merely guides to action. The only restraint upon Congress is not to be found among the enumerated powers, but among the powers expressly denied to the Congress; that is, Congress is forbidden to exert sovereignty in only those area in which the Constitution expressly forbids it. This nationalist interpretation became all the more important to the radicals when Washington accepted it and signed the Bank Bill into law. The seriousness with which the radicals took this trend towards the expansion of the powers of the federal government can be seen from the fact that the radicals took to calling Jefferson's election to the presidency in 1800 as the "revolution of 1800." (Quotes from Jefferson and Hamilton are from Cunningham, Noble, *In Pursuit of Reason, The Life of Thomas Jefferson, op.cit.*, pp.166-167).

13. This question was raised by the Congress; the editor of the Congressional journal for this period had remarked in the margin next to this clause: "Should not the ... article provide for a toleration ... (of laws) hereafter to be made?" (Jensen, *op. cit.*, appendix 1).

14. The possibility that individual states would form alliances, either economic or military, with foreign powers seems to have been a fear that ran deeply through the convictions of the majority of Americans, both radical and conservative. That it bothered the radicals is shown by the fact that this prohibition on the states in carrying out any type of foreign policy survived the Dickenson draft and appeared almost unchanged in the final, more radical form in which the Articles eventually passed the Congress. (*Articles of Confederation*, article 6.). That it bothered the conservatives can be seen from the fact that this prohibition was carried over to the Constitution of 1787 (*U.S. Constitution*, article 1, section 10); also, in *Federalist Paper number 7*, Alexander Hamilton, a leading conservative, pointed out how easy the process would be, absent a strong central government, for the various states to find reasons to wage war against each other; in *Federalist Paper number 13*, he predicted that without the unifying force of a national government, the states would splinter into three or four confederacies, each hostile to the others' interests. The likelihood that these antagonistic blocs would ally with the British (who still maintained a formidable presence in America even after the Treaty of Paris in 1783) was strong. Thus, the desire to keep the foreign relations of the United States out of the hands of the states themselves seems to be a common characteristic shared by conservatives and radicals alike.

15. Dickenson draft of the *Articles of Confederation*, article 4.

16. *Ibid.*, article 5.

17. *Ibid.*, article 8.

18. *U.S. Constitution*, article 1, section 10.

19. Dickenson draft of the *Articles of Confederation*, article 11.

20. *Ibid.*, article 16.

21. *Ibid.*, article 16.

22. The other two main issues in question were 1) the issue of western land claims by the various states, and 2) the basis for taxation; i.e., were taxes to be apportioned on the basis of population or on the basis of the value of the land in each respective state.

23. Thomas Jefferson exemplified this glorification of reason; a biographer of Jefferson wrote; "...the most helpful key to understanding Jefferson (is) in his commitment to the application of reason to society." (Cunningham, Noble, *In Pursuit of Reason, op. cit.*).

24. Madison, James, *Notes, op.cit.*, p.447.

25. McDonald, Forrest, *E Pluribus Unum, Op. cit.*, pp.25-40, is the source for the discussion in the text regarding the split between conservatives and radicals. This section also contains further illuminating discussions on the vast differences in political philosophies between the radical and conservative factions of early American politics.

26. *Articles of Confederation,* article two.

27. See Thomas Jefferson's Autobiography, *op. cit.*, pp.58-64, on the embarrassment of the members caused by the Congress' inability to muster a quorum to debate important national matters.

28. *Ibid.*, p.60.

29. *Ibid.*, pp.56-62.

30. McDonald, *E Pluribus Unum,* p. 228.

31. *Ibid.*, p. 230.

32. *Articles of Confederation,* article 9.

33. *Articles of Confederation,* article 6.

34. *Articles of Confederation,* article 6..

35. McDonald, *E Pluribus Unum,* p. 237.

36. The Articles of Confederation required nine states to be present in Congress before the following actions could be taken: "...engage in a war, grant letters of marque and reprisal in times of peace, enter into any treaties or alliances, coin money and regulate the value thereof, ascertain the sums and expenses necessary for the welfare and defense of the United States, or any of them; or emit bills or borrow money on the credit of the United States, or appropriate money, or agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, or appoint a commander in chief of the army or navy ... " (*Articles of Confederation*, article 9.)

37. McDonald, *E Pluribus Unum,* p. 237.

38. *Ibid.*, pp. 238-247.

39. McDonald advances the theory, in *E Pluribus Unum* on p. 247, that the lack of a quorum was purposefully generated by the conservative faction to point out further the weakness of the national government, and to give the conservatives an excuse for calling a Constitutional Convention to attack the weaknesses of the Confederacy.

40. *Ibid.*, p. 247.

41. *Ibid.*, pp. 250-251.

42. *Ibid.*, pp. 255-256.

43. The seven states mentioned, in chronological order of their legislature's resolutions for the Constitutional Convention were: Virginia, New Jersey, Pennsylvania, North Carolina, New Hampshire, Delaware, and Georgia. After these seven acted, and after Shays' rebellion was successfully put down by the governor of Massachusetts, the New York legislature elected delegates to the Convention, making the fear generated by Shays' rebellion directly or indirectly responsible for the attendance of eight states at the Constitutional Convention. Ironically, two days prior to electing delegates to the Convention, the legislature had rejected the import tax amendment to the Articles of Confederation, thereby depriving the Congress of the one revenue amendment that still had a chance at passage. (See page 10 of the text for a review of the three revenue amendments that were pending before the state legislatures during this term of Congress.) (Source: McDonald, *E Pluribus Unum*, pp. 252-256.)

44. *Ibid.*, p. 256.

45. One attempt at this definition was the "Supremacy Clause" of article 6: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme lair of the land; and the judges in every state shall be bound thereby, any Thing in the Constitution or the laws of any state to the contrary notwithstanding." (*U.S. Constitution*, article 6). However, the progress of this idea through the convention, the questions concerning the operation of this clause purposefully left unanswered, and the subsequent interpretation of this clause by the state judiciaries under the new Constitution all show that even this seemingly clear assertion could be ambiguous. The next chapter will cover this process in detail. Therefore, even though an attempt was made to strengthen the federal government at the Convention of 1787, and that attempt was undoubtedly successful, there still existed at the end of that convention a serious question of the ultimate sovereignty of the federal government *vis-a-vis* the states. That ultimate question, given fatal importance by the sectional split that the nation suffered in the fateful decade of the 1850s, ultimately would be decided by civil war.

VI. THE SUPREMACY CLAUSE IN THE CONSTITUTIONAL CONVENTION

A. INTRODUCTION

The United States Constitution seems to speak unequivocally about the question of federal versus state sovereignty: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding."[1] This chapter will trace the development of this clause as it progressed through the Constitutional Convention; and in the process of that progression, and in the process of the implementation of this concept by the new government, it will become clear that even a seemingly straightforward concept of the federal-state sovereignty question would become obfuscated in the political battles between the proponents and opponents of a strong, centralized federal power.

B. THE RANDOLPH PLAN

On May 29, 1787, in the Federal Constitutional Convention meeting in Philadelphia, Edmund Randolph of Virginia rose to address the delegates concerning the inadequacies of the present federal government which was operating under the Articles of Confederation. His speech contained four main objectives; *viz.*, a) To inquire into the properties that a federal system of government should possess; b) to inquire into the defects of the present confederation; c) to inquire into the danger of the present situation in which America found itself; and d) to propose a remedy. Concerning the first inquiry, Randolph stated that there were five characteristics that a federal government must meet: "...to secure against foreign invasion, to secure against dissentions between members of the Union or seditions in particular states, to procure to the

several states various blessings of which an isolated situation was incapable, to be able to defend itself against encroachment, and to be paramount to the state constitutions."[2]

Randolph's assertions of the characteristics of a federal government are remarkable in that four of the five characteristics deal with the relationship of the national government to the individual state governments; in only the first of these characteristics, to protect itself from, foreign invasion, did Randolph see the main threat to the sovereignty of the nation's government coming from without; in all the other cases mentioned, the threats to the government's stability come from within, from either rebellious citizens (seditions in particular states) or from recalcitrant, jealous state governments (to defend itself against encroachments). Furthermore, Randolph clearly saw that the threat to the general welfare of the people, not just the functioning of the government, came from the various state legislatures. These sentiments combined to produce the fifth characteristic: that the federal Constitution be the supreme law throughout the several states.

Randolph then turned his attention to the defects of the government under the Confederation: "...the Confederacy produced no security against foreign invasion ... that the federal government could not check the quarrels between states ... that the federal government could not defend itself against the encroachments from the states ... that (the federal government) was not even paramount to the state constitutions ... "[3]; again, in this section, Randolph returned to the theme of the weakness of the federal government in the face of state sovereignty.

Finally, having then reviewed the danger of the situation in which the United States found itself[4], Randolph then proceeded to propose his blueprint for the efficient, effective functioning of the federal government. It is to these resolutions in general, and the sixth resolution in particular, that one can trace the birth of the supremacy clause as it finally appeared in article six of the new Constitution.

These resolutions introduced by Randolph are interesting in that they illustrate just how far the members of the convention were willing to go in the revision of the Articles of

Confederation; even though the ideas seem routine today, it must be remembered that it was only ten years prior to this convention that the Congress had totally rejected the Articles drafted by John Dickenson that could have in any way been construed to infringe on the ultimate sovereignty of the state governments. Randolph started out his resolutions with the statement that the Articles of Confederation had failed in their purpose: "Resolved that the Articles of Confederation ought to be so corrected and enlarged to accomplish the objects proposed by their institution ..." The legislature described in the next five articles is not referred to as a "federal" body, but as a "national legislature." The seventh article calls for a "national executive" to be instituted[5]; Resolutions eight and nine deal with the setting up of a "national judiciary," the members of which were to form a "council of revision" to examine every act of both the national and state legislatures as a check on that act's constitutionality. Resolution thirteen proposed that the Constitution be amended from time to time if needed by a process which bypassed the national legislature, and resolution fourteen proposed that all state executive, legislative, and judicial officers be required to take an oath to support the "articles of Union"; i.e., to acknowledge the supremacy of the national government over the governments of the several states.[6] As important as these articles were to the question of state-national supremacy, it was the sixth resolution that struck the most telling blow for the nationalistic forces.

"Resolved, that each branch ought to posses the right of originating Acts; that the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states contravening in the opinion of the national legislature the Articles of Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the Articles thereof."[7] This is the sixth resolution introduced into the Convention by Randolph. If the other articles indicated a break with the radical philosophy embodied in the government under the Articles of Confederation, this

resolution, if enacted, would completely transform the federal system of government under which the United States had been operating since it declared independence in 1776. The other resolutions dealt with the fact that a new national government was to be constituted and that it would have certain powers. The sixth resolution spoke directly to the fact that this new government, and the sovereign powers it claimed, would clash directly with the sovereign powers now exercised by the respective states. It clearly stated that when that clash of sovereignties occurred, it would be the national government that would reign supreme. Compare the language of this resolution to that of the Articles of Confederation: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[8] Under the Articles of Confederation, it was the federal Congress which was restricted by the expressly delegated powers; the "elasticity" of the government was claimed by the states. Under Randolph's plan, this design was completely reversed. The national legislature would be granted two very important powers; these powers would ensure that the national government would exercise the supreme jurisdiction in a case of a dispute with a state: a) the national legislature was expressly granted veto power over the acts of the state legislatures which were unconstitutional, and b) it was the power of the national legislature, not the states, to determine the unconstitutionality of any state legislature's act. Finally, the national government would be given the power not only to decide constitutionality of state laws and to negative those which did not pass its muster, but also to enforce its decision by the "force of the Union." Thus, as these resolutions show, the Convention was ready to attack the question of a weak central government almost immediately, and the resolution proposed to deal with that weakness was a complete repudiation of the radical ideas of government on which the Articles had been founded.

C. RANDOLPH'S RESOLUTIONS IN THE COMMITTEE OF THE WHOLE HOUSE

The Convention then formed itself into the Committee of the Whole House and proceeded to debate the Randolph resolutions, clause by clause. On May 31, 1787, the Committee took up the question of the sixth resolution. Surprisingly, given its extremely conservative language, this resolution occasioned no strong debate. The Committee unanimously adopted the provisions of the resolution which called for giving both Houses of the national legislature the right to originate bills and which gave the existing powers of the Articles' Congress to the national legislature. On the question of granting the power to the national legislature to legislate in areas of state "incompetence," the vagueness of that statement led to some question. John Rutledge of South Carolina, in raising this question, stated that the specific powers envisioned by this term would have to be specifically enumerated before delegates could make up their minds on how to vote for this resolution. Pierce Butler, also of South Carolina, objected to this clause of the resolution in that it went too far in taking power from the states; James Madison of Virginia also spoke on this clause; he stated that he had originally entered the convention with the sentiment that the powers of Congress should be specifically enumerated; yet he now was beginning to doubt the practicality of such an enumeration. The formation of a government that could provide for the "safety, liberty, and happiness of the community" was the goal of the convention; and he "...would shrink from nothing which should be found essential to such a form of government ..." Interestingly, the only delegates who spoke on this issue were southerners. The Committee then passed the clause in question, nine states voting in the affirmative, with Connecticut divided (Roger Sherman voting "no"; Oliver Ellsworth voting "aye"). Then, Benjamin Franklin proposed to add the clause "or any treaties subsisting under the authority of the Union" after "contravening ... the articles of the Union"; the clauses giving the national Congress the power to negative state laws then passed unanimously. On the question of the clause giving the Congress the power to use force to enforce its laws, the Committee voted unanimously to postpone the vote after Madison rose and spoke against it. Thus, when the resolutions were reported out of the

Committee of the Whole House on June 13, 1787, the sixth resolution was slightly changed, with Franklin's clause having been added and the last clause referring to the use of force by Congress against the states having been dropped.[9] The next day, June 14, William Paterson of New Jersey rose and moved that the Convention adjourn for the day so that the delegates might study the plan; he also indicated that he would then submit a plan "...purely federal, and contradistinguished from the reported plan."[10] This plan, called the "Paterson plan" or the "small state plan," was to present a serious challenge to the notion of federal supremacy called for by the sixth resolution of the Randolph plan.

D. THE PATERSON PLAN'S CHALLENGE TO THE RANDOLPH PLAN

The Paterson plan is often pictured as the "small state" response to the Virginia plan regarding the construction of the legislative branch of the government; it is true that, where the Virginia plan called for a bold restructuring of the federal legislature in resolutions two (which called for a bicameral legislature), three and four (dealing with the mode of election to each House), five (dealing with the subject of which House could originate certain types of Acts), seven (the basis of representation in the lower House), and eight (the basis of representation in the upper House), the Paterson plan called for a unicameral legislature with each state having an equal vote in the Congress. The first resolution laid out the limited scope of the Paterson plan: "Resolved, that the Articles of Confederation ought to be so revised, corrected, and enlarged, as to render the federal Constitution adequate to the exigencies of government and the preservation of the Union."[11] In other words, the Paterson plan would leave the structure and form of the legislature unchanged, while granting Congress certain expanded powers. Therefore, it is not inaccurate to describe the differences between the Randolph plan and the Paterson plan as differences in the composition and structure of Congress.

Yet, that description does not convey the true depth to which these two plans deviated from one another. The ultimate difference between the two plans revolved around the question of

federal versus state sovereignty. For while the sixth resolution of the Virginia Plan as reported from the Committee of the Whole House on the thirteenth of June claimed the ultimate sovereignty for the federal government, the Paterson Plan hedged: "Resolved, that all acts of the United States in Congress assembled, made by virtue and in pursuance of the powers hereby and in the Articles of Confederation vested in them, and all treaties made and ratified under the authority of the United States shall be the supreme law of the respective states so far forth as those acts or treaties shall relate to the said states or their citizens ... "[12] The differences between this plan and the Virginia Plan are subtle, yet important. Whereas the Randolph, Plan speaks of a "national legislature," the Paterson Plan speaks of "the United States in Congress assembled." The "national legislature" would be a national body, separate from the states; therefore, the members of the national legislatures would comprise a body separate from, and superior to, the several states. In Paterson's concept, the federal Congress is not a body separate from the states; it is, indeed, the states which comprise the Congress; in other words, the legislators under this concept would act merely as the agents of the states. Where the Virginia Plan gave the national legislature a veto on state legislation, the Paterson plan had no such provision; it stated instead that the lairs passed by the federal Congress would be conditionally binding on the several states. Two things are interesting here: 1) by using the language "the supreme law of the respective states," Paterson was making it clear that the federal Congress under this scheme of government acted only upon the states, not directly upon the people. In this way, the government was truly federal, not national, in that it could not act without going through its agent, the several state legislatures; 2) by indicating that federal law would be supreme to state law only in those cases where the law related to the states, and by being silent on who was to determine when such a law was applicable to the states, this plan obviously leave this determining process to the several states themselves. This can be inferred from the fact that Paterson wanted only a revision of the Articles of Confederation; in no resolution of his plan did he call for an overhaul of the second Article of Confederation which granted supreme sovereignty to the states; therefore, he must have

anticipated that this power to determine if a federal law was applicable to the states would fall to the states themselves. This provision, therefore, would have eviscerated the national supremacy concept of the Virginia Plan, reducing it to meaninglessness.

The fact that the difference between the Virginia and New Jersey plans was not merely a disagreement over the construction of the legislative branch can be gleaned from the character of the debate over the two plans. John Lansing of New York, a delegate who eventually would leave the Convention in protest against the form the new government was beginning to take, was the first delegate to take the floor in this debate:

> "...(these plans) involve principles directly in contrast; that of Mr. Paterson says he retains the sovereignty of the respective states; that of Mr. Randolph destroys it. The latter requires a negative on all the laws of the particular states; the former, only certain general powers for the general good. The plan of Mr. Randolph ... absorbs all power except what may be exercised in the little local matters of the States which are not objects worthy of the supreme cognizance.[13]

Lansing stated that he had two major objections to the Virginia Plan: "(First), the want of power in the Convention to discuss and propose it; (secondly), the improbability of the (Virginia Plan) being adopted..."[14] Peterson, the next speaker, unsurprisingly speaking in favor of his own plan, voiced similar objections to the Virginia Plan:

> I prefer (my plan) because it accords with the powers of the convention and the sentiments of the people ... If the Confederacy is radically wrong, let us return to our States, and obtain larger powers, not assume them of ourselves. I came here not to speak my own sentiments, but the sentiments of those who sent me. Our object is not such a government as may be best in itself, but such a one as our constituents have authorized us to prepare ...

Paterson then read the fifth and thirteenth article of the Confederation (the ones giving each state one vote and requiring unanimous consent of the states for any amendment, respectively), and then he observed: "What is unanimously done must be unanimously undone."[15]

The argument for the Paterson Plan was characteristic of the many arguments that the anti-federalists were to muster against the ratification of the Constitution when it was finally reported out of the Convention; the argument was legalistic and narrow, focusing in on the imagined dangers of a national plan rather than pointing to any good that may come from a more

federal, less national system. Paterson's argument fluctuated between matters of principle (state sovereignty in a federal system) and matters of inconsequential trivia. For example, at the end of his speech, he complained that the plan proposed by Randolph would result in a national Congress of 270 members:

> ...(who will be) coming at least once a year from the most distant ... parts of the republic. In the present ... state of our finances, can so expensive a system be seriously though of? By enlarging the powers of Congress, the greatest of this expense will be saved ...[16]

It is truly remarkable that in the debate over the nature of the national government, the man who proposed the plan for limited government would actually make such a trivial argument. In Paterson's speech, he listed no reasons how the government under his plan would govern more effectively or efficiently. He merely stated that the principle of state sovereignty was fundamental one; regardless of the consequences to the nation government, it was a principle that could not be abandoned. This principle would have carried the day in 1781; after the experience of the decade of the 1780s, a more persuasive argument was needed. As it turned out, the proponents of Paterson's plan offered two main objections: 1) any modification of the Confederation by the Convention would be extra-legal and therefore void; and 2) the people themselves would never sanction a national government.

After Paterson finished, James Wilson of Pennsylvania rose to speak. A native of Scotland and a signer of the Declaration of Independence, Wilson was a strong nationalist. Whether his nationalism was a product of sincere conviction or of his deep speculation in western land claims is a question to which the answer will never be forthcoming. At any rate, Wilson was the first nationalist to answer the objections of Paterson to the Virginia plan. He first moved to answer the question concerning the power of the Convention to alter the Confederation: "With regard to the power of the Convention, I perceive (the delegates) as authorized to conclude nothing, but to propose anything."[17] He then moved against Paterson's second argument: *viz.*, the people would never support national government. He stated that it was impossible to accurately gage the

sentiments of the people. Accusing the proponents of the Paterson Plan of substituting their judgements for the judgement of the people, Wilson asked:

> Why should a national government be unpopular? Has it less dignity? ... Will a citizen of Delaware be degraded by becoming a citizen of the United States? Where do the people look at the present (time) for relief from, the evils of which they complain? Is it from an internal reform of their (state) government? No, sir. It is from the national councils that relief is expected.[18]

When Wilson was finished, the last speaker of the day, Edmund Randolph of Virginia, rose to speak. In answering Paterson's first objection, he spoke more bluntly than Wilson: "When the salvation of the republic is at stake, it would be treason... not to propose what (remedy) we found necessary ... A national government alone, properly constituted, will answer the purpose ... the present is the last moment for establishing one ..."[19] In answering Paterson's second objection, he painted a grim picture of the consequences of allowing such a limited federal government as the one proposed by Paterson to exist any longer: "(The plan proposed by Paterson) attains the end of general government by coercion ... it is impractical, expensive, and cruel ... we must resort, therefore, to ... national legislation over individuals ... (or) the people will yield to despair."[20] In other words, Randolph was saying that regardless of the peoples' proclivity for accepting a national government at the time, if one was not immediately instituted, they would fast lose faith in the existing arrangement of government. He stated further: "...notwithstanding what has been said to the contrary, (my) own experience has satisfied me that a rooted distrust of Congress pretty generally prevail(s)."[21] On that pessimistic note, Randolph concluded his speech, and the Convention adjourned for the day.

Thus, the debate following the introduction of the two competing forms of government proposed by Edmund Randolph and William Paterson shows that the main question that emerged in the discussion of these two plans was a question more fundamental than a mere disagreement over the constitution of the federal Congress; rather, it was a question concerning the very nature of the government which the United States should have. The subtle yet profound rewording of what was later to emerge as the federal supremacy clause underscores this fundamental dilemma:

which was to be supreme, the national government or the various legislatures of the several states? As the supremacy clause proceeded through debate in the Convention, the hand of the nationalists was to be strengthened considerably. Yet this was a quantum leap in government for these delegates to make, and they did not make it without more serious reflection on what form of government would best serve the needs of the nation. As the Convention adjourned on Saturday, the 16th of June, another delegate was ready to propose another plan of government. As the 16th was a Saturday, the delegates would have to wait for Monday to hear this new plan, proposed by a delegate from New York, Alexander Hamilton.

E. ALEXANDER HAMILTON AND HIS PLAN OF GOVERNMENT

Throughout his public career, Hamilton would prove himself to be a strong nationalist; his opinion as Secretary of the Treasury on the constitutionality of a national bank for the United States would forever stamp him as a "loose constructionist"; one for whom the blueprint of the Constitution constituted mere guidelines for actions, not constraints on national power. This was a man who, in writing the Federalist Papers, would castigate the government under the Articles for weakness, and who would argue for "energy in the executive."[22] However, the most convincing evidence of the depth of Hamilton's nationalistic leanings comes from his speech before the Constitutional Convention on June 18, 1787. In proposing his plan of Government, Hamilton first attacked the legalistic theory that the Convention lacked the legitimate authority to change the Articles of Confederation:

> ...we owe it to our country to do on this emergency what ever we should deem essential to its happiness. The states sent us here to provide for the exigencies of the Union. To rely on and propose any plan not adequate to these exigencies merely because it was not clearly within our powers would be to sacrifice the means to the end.[23]

He then moved to examine the two plans that had been put forward ("...there are essential defects in both[24]"), and to put forth for consideration the principles he felt were necessary for the support of a government. More importantly, he described these principles in terms of their impracticability

when employed by a national government in the face of state governments which retained in large measure degrees of sovereignty which put them at odds with the national power. Hamilton determined the first principle to be an active and constant interest among the people in supporting it. In terms of this first principle, he stated that the principle of state sovereignty was diametrically opposed to the concept of a national government: "This principle does not exist in the states in favor of the federal government ... (the states) constantly pursue internal interests adverse to those of the whole. They have their particular debts (and) their particular plans of finance ... All these ... invariably prevail over the requisitions and plans of Congress."[25] The second principle necessary for the support of a government was the love of power. Again, this principle worked against a national system where the states retained a portion of their sovereignty: "The states have constantly shown a disposition rather to regain the powers delegated by them than to part with more, or to give effect with what they have parted with."[26] The third principle of government was the habitual attachment of the people to it. Again, a national government could not command this attachment in a system in which the states retained their sovereignty:

> The whole force of this tie is on the side of the state government. Its sovereignty is immediately before the eyes of the people. Its protection is immediately enjoyed by them. From its hand, distributive justice and all those acts which familiarize and endear a government to a people are dispensed to them.[27]

The fourth principle was the power of coercion by laws or force of arms. The federal Congress had used the coercion of laws only infrequently on the states; the use of the force of arms exercised collectively upon a state by the Union was impossible; it would lead to Civil War. Therefore, the coercive power of a national government in a system which placed a premium on state sovereignty was impractical and counterproductive. If armed intervention was attempted: "Foreign powers would not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union will ensue."[28] The fifth and last principle of government was "influence"; not bribery or extortion, but "...the dispensation of those regular horrors and

emoluments which produce an attachment to the government." Again, the nation government was working at a disadvantage *vis-a-vis* the states when the state retained important elements of their sovereignty: "Almost all of the weight of (this influence) is on the side of the states, and must continue as long as the states continue to exist."[29] The net result of the system under the Articles, in which a theory of dual federal-state sovereignty existed, was that "...all the passions ... of avarice, ambition, interest which govern most individuals and all public bodies fall into the current of the states, and do not flow in the stream of the general government. The former therefore will generally be an overmatch for the general government and render any confederacy in its very nature precarious."[30]

Having stated the reasons why the dual existence of state and national sovereignties was impossible, Hamilton then moved on to the radical idea of his plan: abolish the states altogether. "If (the state governments) were extinguished, ... great economy might be obtained by substituting a general government ... (states) are not necessary for any of the great purposes of commerce, revenue, or agriculture ... subordinate authorities (will) be necessary ... but *cui bono* the vast and expensive apparatus now appertaining to the states?"[31] In addition to his distrust of the states and his desire that they be eliminated, Hamilton moved to a new subject: *viz.*, the nature of the new national government that was to be created as a replacement for the various state governments. In this passage, two themes stand out: 1) a deep respect for the British system of government, and 2) a profound distrust of democracy. Hamilton began by noting that most of the members of the convention had witnessed the result of the excesses of democracy during the tenure of the Confederation Congress ("...The members most tenacious of republicanism were as loud as any in declaiming the vices of democracy ..."), and that further abuses of this system would lead the people to accept a less democratic form ("The progress of the public mind (leads me) to anticipate the time when others as well as myself would join in the praise bestowed ... on the British Constitution ... it is the only government in the world which unites public strength with

individual security ... "[32] His praise of the House of Lords reveals Hamilton's fear of temporary popular passion: "Their House of Lords is a most noble institution. Having nothing to hope for by a change, and a sufficient interest by means of their property in being faithful to the national interest, they form a permanent barrier against every pernicious innovation ... no temporary Senate will have firmness enough to answer the purpose ... seven years (is not) a sufficient period to give the Senate an adequate firmness ... considering the amazing violence and turbulence of the democratic spirit ... popular passions ... spread like wildfire and become irresistible."[33] Having dealt with the legislative shortcomings of the two proposed plans, Hamilton then turned to the question of the executive. Though both plans lying on the table before the convention called for the adoption of a single executive chosen by the Congress for a specified term, this was not sufficient for the government envisioned by Hamilton: "As to the executive, it seems to be admitted that no good one could be established on republican principles ... the English model was the only good one on this subject ... let the executive ... be for life."[34] Having dealt with the shortcomings of the Randolph and Paterson plans in terms of their relationship to his principles of government, Hamilton then turned to the explanation of his own plan.

Not surprisingly, given his feelings on the theory of state sovereignty, the supremacy clause that emerged in Hamilton's plan went far beyond that proposed by either Randolph or Paterson. The tenth article of Hamilton's plan stated: "All laws of the particular states contrary to the Constitution or the laws of the United States to be utterly void; and the better to prevent such laws being passed, the governor or president of each state shall be appointed by the general government and shall have a negative upon the laws about to be passed in the state of which he is the governor or president."[35] Even though Hamilton did not go so far as to abolish the states as individual political identities as he threatened to do in his speech on the floor of the Convention, his placing their legislatures under a federally appointed governor with veto power effectively nullified any claim to a separate sovereignty that a state might make. It seems like Hamilton's plan, with its destruction of the states as sovereign entities, went too far to be taken

seriously; the Convention adjourned after he proposed it, and the journal of Madison for the next day records no debate on its proposals. Without even a mention of Hamilton's plan, Madison recorded on June 19th, "Mr. Paterson's plan was again at large before the Committee."[36]

F. THE ADOPTION OF RANDOLPH'S PLAN AS THE FRAMEWORK OF GOVERNMENT - JUNE 19, 1787

Thus, the Convention had been presented with three separate theories on the issue of federal supremacy. The Hamilton plan had called for the effective abolition of the states as separate sovereign political entities; the Paterson plan, in its call for a slight expansion of federal power within the framework of the Articles of Confederacy, clearly subscribed to the state supremacy view that had produced that document; the Randolph plan lay somewhere in the middle, not calling for the abolition of the states but for a severe restriction on their powers *vis-a-vis* a national government. On the 19th of June, the delegates were forced to decide which of the plans that had been presented was to form the framework for the basic debate on the new federal government. Hamilton's plan was not even voted upon, the motion to postpone discussion on the Paterson plan passed with only two states, New York and New Jersey, voting in the negative; finally, on the question moved by Rufus King of Massachusetts, that the resolutions prepared by Edmund Randolph and amended by the Committee of the Whole House be re-introduced into the proceedings, the Convention voted in the affirmative, 7-3, with New York, New Jersey, and Delaware voting in the negative (Maryland was equally divided). As Madison recorded in his journal, that 7-3 vote was actually a vote to determine "...whether Mr. Randolph's proposals should be adhered to preferable to those of Mr. Paterson."[37] The Convention, meeting since the 25th of May, had finally decided to abandon the Articles of Confederation as the framework for the new government and embark on a discussion that would lead to a federal government with much greater powers than had been allowed by that document. Within this new framework, the concept of state sovereignty was to undergo a profound transformation in its

journey from the Articles to the Constitution; yet, the most profound change in this concept was effected on the 19th of June, 1787, as the states at the Convention decided that the Articles of Confederation were not sufficient to meet the needs of the new nation. Given this starting point, an increase in federal power *vis-a-vis* the states was only logical; yet more discussion was still needed as the theory of federal sovereignty matured from concept to application.

G. RESOLUTION SIX OF THE RANDOLPH PLAN - THE BLUEPRINT FOR THE SUPREMACY CLAUSE

In their debate on the Randolph resolutions, the delegates spent almost a month debating the resolutions concerning the nature of the federal Congress; it was not until the 16th of July that the debate was brought around to the question of Randolph's sixth resolution; *viz.*, the resolution which dealt with the supremacy clause. The first section of the resolution ("That the national legislature ought to possess the legislative rights vested in the Congress by the Confederation") was passed unanimously; the second part of the resolution ("...and moreover to legislate in all cases to which the separate states are incompetent... ") occasioned more debate, with Pierce Butler of South Carolina objecting to the vagueness of the clause. A motion was made to postpone the debate on this clause pending an enumeration of the specific federal power contemplated under this provision; the motion failed on a tie vote, 5-5. Upon the completion of this vote, debate on this clause was postponed until the next day, July 17.[38]

The next day, the uneasiness of the delegates with the language of the second section of the resolution was manifested in two attempts to amend the proposition. The first amendment was proposed by Roger Sherman of Connecticut. Unhappy that the proposition as written "... (made it) difficult to draw the line between the powers of the general legislature and those to be left with the states.... " he proposed that this section of the resolution be amended as follows: in place of the words "individual legislation" should be inserted: "to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to

interfere with the government of the individual states in any matters of internal police which respect the government of such states only, and wherein the general welfare of the United States is not concerned." Sherman was able to muster only two states to vote in the affirmative on this amendment (Connecticut and Maryland), and it failed by a vote of 8-2. The second proposal to amend this section of Randolph's sixth proposition was to meet with success. As opposed to Sheman's amendment, which sought to limit the effect of the clause on state power, this second amendment, offered by Gunning Bedford of Delaware, sought to expand it. It proposed changing the clause to read: "...and moreover to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." After a sharp exchange between Bedford and Edmund Randolph as to the nature of the amendment, the amendment passed 8-2, with South Carolina and Georgia casting the dissenting votes.[39] Thus, at this point in the debate, the first two clauses of the sixth resolution of Randolph's plan had been debated, amended with the result of a strengthening of federal power, and passed with comfortable majorities. The Convention then moved on to the third clause: the power of the national government to negative laws passed by state legislatures.

In reference to this proposed power, there seemed to be a general hostility to the proposition that federal power could so blatantly encroach into what limited sovereignty the states would continue to exercise. Gouverneur Morris, a strong nationalist[40], spoke out strongly against the proposition: "...The proposal of it will disgust all the states ... (it is) not necessary, if sufficient legislative authority should be granted to the general government ... " James Madison, however, was strongly in favor of the concept of a federal negative on state laws: "...the negative on the laws of states (is) essential to the efficacy and security of the general government. The propensity (of the states to pursue their own interests) will continue to disturb the system unless effectively controlled ... " Madison, however, was well out of the mainstream on this question; it was defeated 7-3, with only Massachusetts, Virginia, and North Carolina voting in the affirmative.[41]

The final debate on Randolph's sixth resolution concerned an amendment offered by Luther Martin of Maryland. Martin, a delegate who was opposed to the augmentation of federal power over that granted by the Articles and who would later refuse to sign the Constitution, sought to qualify the power that the federal government by the following addition to the resolution: "That the legislative acts of the United States made by virtue and in pursuance of the articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said states or their inhabitants--and that the judiciaries of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding." Thus, the supremacy of the federal government over the states was conditioned to apply only insofar as the act of the federal government related to the individual state. The effect of this would be to allow a state to evade the supremacy clause in a dispute with the federal government by claiming an act of the government did not directly relate to it. Given the nature of the clause, and given the fiery, combative nature of the man who proposed it, it is curious that this clause was passed unanimously with no debate whatsoever.[42]

H. THE COMMITTEE OF DETAIL - REPORTED TO THE CONVENTION AUGUST 6, 1787

Thus ended the initial phase of the debate on Randolph's sixth resolution, the resolution which eventually would mature into the "supremacy clause" of the United States Constitution. Originally proposed on May 29, 1787, the resolution was submitted along with the other resolutions of Randolph's plan, all heavily amended, to a Committee of Detail on July 26, 1787. To this Committee was given the task of taking the preceding debate of the convention and "preparing and reporting the Constitution."[43] Into the Committee of Detail went the amended sixth resolution; so heavily amended had it become, in fact, especially with Luther Martin's last minute addition, that it was broken up into two separate resolutions, the sixth and the seventh, to be considered by the Committee. On July 26, 1787, the supremacy clause stood in the following form.

Resolution 6: "That the national legislature ought to possess the legislative rights vested in Congress by the confederation; and, moreover, to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[44] The seventh resolution submitted to the Committee of Detail was a verbatim report of the amendment offered by Luther Martin on the 17th of July. Pending the report of the Committee of Detail, due on the 6th of August, the Convention adjourned.

The report of the Committee of Detail, laid before the Convention on August 6, 1787, contained a much leaner version of the supremacy clause than that which had been presented to the Committee eleven days earlier. The article which contained the condensed clause, titled "Article VIII," read as follows: "The acts of the legislature of the United States made in pursuance of this Constitution, and the treaties made under the authority of the United States, shall be the supreme law of the several states, and of their citizens and inhabitants; and the judges in the several states shall be bound thereby in their decisions, anything in the Constitutions or the laws of the several states to the contrary notwithstanding."[45] It is evident from this Committee report that the committee had taken upon itself the responsibility for deleting the adverse effects that Luther's amendment had had on the strength of the supremacy clause. Gone is the clause referring to the supremacy of the federal government only in those acts "relating to the said states... "; in addition to this deletion, the committee also effected a subtle rewording of another part of Luther's amendment; where Luther had spoken of the "citizens and inhabitants" of the states only insofar as they were to be used to determine the applicability of a federal law to a certain state, the new clause said that the acts of the federal legislature were to be the "...supreme law of the several states, and of their citizens and inhabitants..." This concept of national laws being directly applicable to the people of the nation was a revolutionary one; for a *federal* government could only act on the states; a *national* government could act directly upon the

people.[46] In this committee report is gleaned the first evidence of the Convention's desire to institute a truly national government, containing, in is true, federal aspects insofar as the recognition of states as separate political entities is concerned (that is, the committee did not abolish the states altogether as Hamilton had proposed) and the real power granted to those entities[47]; yet, at the same time, containing a national aspect in that the power of the government could be exercised directly upon the people. Thus, August 6, 1787, was the first day the Convention had before it a plan containing a true "supremacy clause."

I. THE CONSTITUTIONAL CONVENTION DEBATES THE SUPREMACY CLAUSE

The debate over this draft proposal for the Constitution reported from the Committee of Detail had the air of finality about it; a motion to refer the report to the Committee of the Whole, moved by Charles Pinckney of South Carolina on the 7th of August, was opposed "...as likely to produce unnecessary delay ... "[48]; thus, a little more than two weeks later, on the 23rd of August, the Convention took up debate on article VIII. The debate was short; it consisted of a vote taken on one amendment proposed by John Rutledge of Virginia; he proposed to strengthen the clause by making supreme over the states not just the "acts of the Legislature of the United States," but instead "the Constitution and the laws of the United States made in pursuance thereof."[49] As quickly as it was introduced, occasioning no debate at all, the amendment passed by a unanimous vote. It was in this form that the supremacy clause would remain until the report of the Committee of Detail, amended by the Convention between August 6th and September 10th, was referred to the Committee of Style and Arrangement for fashioning into the document that would become the United States Constitution.

J. THE COMMITTEE OF STYLE AND ARRANGEMENT - SEPTEMBER 12, 1787

The report of the Committee of Style and Arrangement was laid before the Convention on the 12th of September, 1787. The supremacy clause, now found in article VI of the new report,

contained one major change. The clause now read: " This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land; and the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."[50] The major change occurred in the first sentence. No longer is the Constitution the "supreme law of the several states"; it is the "supreme law of the land." The effect of this clause was to strengthen the *national* characteristic of the new government at the expense of the *federal* characteristic. From the new government would issue the "law of the land," not the "law of the several states." In other words, the transition from the concept of federalism inherent in the amendment offered by Luther Martin on the 17th of July and passed unanimously to the concept of nationalism expressed in the final form of the supremacy clause laid before the convention on the 12th of September was complete. There was still a week left of the debate before the Constitution was signed on September 17, 1787. Yet the supremacy clause itself suffered no revision. The Committee of Style and Arrangement had had the last word.

K. CONCLUSION

Thus, the concept of a government simultaneously federal and national, exercising strong powers over the individual states and the people, a concept so foreign to American political thought only four years previously, grew to fruition. The debates in the Constitutional convention were heated; several topics, most notably the nature of the legislative branch, the basis for representation and taxation, and the question of the nature of the executive, occasioned long and passionate debates. In contrast, the debate on what would become known as the "supremacy clause" was relatively moderate; many amendments were passed with no real opposition, and the debate was comparatively short. But the journey of this clause in its various forms through the convention during the hot summer months in Philadelphia in 1787 is more than the story of the transformation of a clause in a legal document. In its truest sense, it is the story of America

coming to grips with the need for a completely revolutionary change in the nature of its government; this nature, the supremacy of the federal component of government under the national/state dual sovereignty system that emerged from the convention, was to cause many constitutional debates during the first eighty years of the republic. Yet no debate was quite so fundamental than the one occasioned on December 20, 1860, when South Carolina passed its Ordinance of Secession. The sentiments embodied in the supremacy clause which passed the Convention that September of 1787 would lead the national government to resist, and eventually destroy, the most serious threat to its sovereignty ever posed, before or since. It is in that context that the concept which undergirded the supremacy clause, the concept of national supremacy over state supremacy which triumphed in Philadelphia in 1787, found its most powerful expression.

CHAPTER VI ENDNOTES

1. *United States Constitution*, article 6. This chapter traces the evolution of this "supremacy clause" through the convention debates beginning on May 29, 1787, with the introduction by Edmund Randolph of the "Virginia plan" and ending on September 17, 1787, with the passage of the final document. The evolution of the clause can be traced as follows:

• May 29, 1787: Edmund Randolph of Virginia introduces a series of fifteen resolution, of which the sixth read: "Resolved that each branch (of the national legislature) ought to possess the right of originating acts; that the National legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states, contravening in the opinion of the national legislature the articles of Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof." This, in nascent form, was what was to become the supremacy clause of the Constitution.

Randolph's resolutions are amended by the Convention in debate from the time of their introduction until June 13, 1787, when the Convention, in the Committee of the Whole House, reports out the resolutions as amended. The sixth resolution of this plan now stands, after amendment, in the following form: "Resolved that the national legislature ought to be empowered to enjoy the legislative rights vested in the Congress by the Confederation; and moreover to legislate in all cases to which the separate states are incompetent; or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states contravening in the opinion of the national legislature the articles of Union, or any treaties subsisting under the authority of the Union."

• June 15, 1787: William Paterson of New Jersey, stating that he wished to present a plan "purely federal, as contradistinguished from the reported (Virginia) plan," introduces a series of resolutions into the Convention to form a basis of debate against Randolph's plan. Contained in his plan is the "small state" answer to Randolph's supremacy clause, resolution 6: "Resolved that all acts of the United States in Congress made by virtue and in pursuance of the powers hereby and by the Articles of Confederation vested in them, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states so far forth as those acts or treaties shall relate to the said states or to their citizens; and that the judiciary of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding; and that if any state, or any body of men in any state shall oppose or prevent carrying into execution such acts or treaties, the federal executive shall be authorized to call forth the power of the confederated states, or as much thereof that may be necessary, to enforce and compel an obedience to such acts, or an observance of such treaties." Note that the powers of the new government are constrained within the framework of the Articles of Confederation, there is no mention of the power to negative state laws, and the supremacy of federal law is contingent upon to what extent the federal law "relates" to the particular state. In addition, in place of Randolph's "national legislature", there is a "United States in Congress" assembled; in other words, the government is merely an agent and creation of the states, acting not on the people

themselves but only through the states. This is the mark of the federal government, the government in which the states remained the true repositories of sovereignty, which the proponents of this plan wished to construct.

• June 19, 1787. The Convention votes, 7-3, that the plan proposed by Randolph, not the plan proposed by Paterson, will be the framework for further debate. In this vote, the delegates indicated that the government under the Articles of Confederation was insufficient to meet the needs of the nation. The three states casting the negative votes were New York, New Jersey, and Delaware.

• July 26, 1787. Heavily amended in floor debate since their re-introduction into the Convention on the 19th of June, Randolph's resolutions are sent to the "Committee of Detail" for "the preparing and reporting of the Constitution." The sixth resolution had been so heavily amended that it was now split into two separate resolutions, the sixth and the seventh. Here is the form they were in when they were sent to the Committee of detail on the 26th of July. "Resolution VI: Resolved, that the national legislature ought to posses the legislative rights vested in Congress by the Confederation; and moreover to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation. Resolution VII: Resolved, that the legislative acts of the United States, made by virtue, and in pursuance of the articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said states, or their citizens and inhabitants; and that the judiciaries of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding." Obviously, despite their defeat on June 19th, the delegates supporting a limited federal government had made some serious inroads into the concept of national supremacy; the seventh resolution sent to the Committee sounds almost like the Paterson version of the supremacy clause which had been voted down one month previously.

• August 6, 1787. Those who were concerned that the supremacy clause had been weakened during the debate were probably encouraged by the report from the Committee of detail, laid before the Convention on the 6th of August. The clause, labeled article VIII in the report, read: "The acts of the legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the several states, and of their citizens and inhabitants; and the judges in the several states shall be bound thereby in their decisions; anything in the Constitutions or the laws of any state notwithstanding." The language which made federal supremacy conditional upon the "relation" of the law to the state has been removed; notice also the subtle rewording of the clause which makes federal law supreme over the states, their citizens, and their inhabitants. This indicates a government that is truly national; that is, one that can operate directly on citizens and states, not just the latter with the exclusion of the former. It must be noted here that this strengthening of the supremacy clause was done in committee without a formal, recorded vote by the convention.

• August 23, 1787. In convention debate, article VIII is amended by unanimous vote to read: "The Constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the several states and of their citizens and inhabitants; and the judges in the several states shall be bound thereby in their decisions, anything in the Constitutions or the laws of the several states notwithstanding." On September 10, 1787, the report of the Committee of Detail, as amended, was sent to the Committee of Style and Arrangement, from which it emerged on September 12, 1787. The supremacy clause, now found as part of Article VI, had undergone its final amendment. Gone was any mention of the federal concept of "supreme law of the

several states"; in the place of that clause was substituted one that had a more national ring to it, "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitutions or the laws of any state to the contrary notwithstanding."

In such manner did the concept of national supremacy, first introduced into the convention on the 29th of May, grow into the supremacy clause found in the final draft of the U.S. Constitution. It is interesting to note that, even though the concept of national supremacy underwent extensive debate in the Convention during that summer, the two major revisions that really shaped the clause into its final form were the result of the work of two the Committee of Detail and the Committee of Style and Arrangement, whose work was done outside the framework of the formal debate and voting procedures of the Constitutional Convention.

2. Madison, James, *Notes on the Debates in the Federal Convention of 1787*, Ohio University Press, Columbus, Ohio, 1966, p. 29. Edmund Randolph, thirty-three years old at the time of the Convention, was the governor of Virginia. The "Randolph plan" and its strong nationalistic sentiments, probably the composite effort of the seven-man Virginia delegation, reflected the wish of the delegates to alter the framework of the national government from the form then existing under the framework of the Articles of Confederation to a stronger, more centralized government. Randolph, who introduced the plan into the Convention and often introduced amendments to strengthen it, refused to sign the final document, saying that he felt that the object of the Convention would be frustrated by the alternative it presented to the people. "Nine states will fail to ratify the plan, and confusion must ensue," he stated. (*Notes*, p. 656). In all probability, Randolph, who was unsure of the prospects for ratification in his home state of Virginia (where the Constitution was sure to be opposed by Patrick Henry, a power in state politics), wished to remain free to do some political maneuvering should the Constitution fail to pass his state. This motivation attributed to Randolph here can be gleaned from statements that he made to the convention concerning the signing of the final document. See for example, Peters, William, *A More Perfect Union, The Making of the United States Constitution*, Crown Publishers, Inc., New York, New York, 1987, pp. 199-200, for this quote from Randolph: "I am unwilling to impede the wishes and judgement of the Convention, but I must keep myself free, in case I should be honored with a seat in the convention of my state, to act according to the dictates of my judgement." In addition to his desire to keep himself free to form an independent judgement in his state's ratifying convention, Randolph opposed the proposed method of ratification; specifically, he objected to the decision to eschew an attempt to gain the approval of the Confederation Congress and to go directly to state ratifying conventions. Furthermore, he objected to the fact that the ratifying conventions would not have the power to propose binding amendments. See Mee, Charles L., Jr., *The Genius of the People*, Harper and Row Publishers, New York, New York, 1987, pp. 272-274, for an explanation of this objection. In addition, Randolph insisted that, the Confederation Congress and the state conventions having approved the Constitution, the document should then be sent back to a second general Constitutional Convention for final approval. The other delegates were loathe to do this; one state's dissenting vote in the Confederation Congress would have killed the new government; that vote certainly would have been provided by Rhode Island, who was not even represented at the Convention. Randolph held firm in his objections, however, and did not sign the document.

Ironically, at the Virginia ratification convention in June of 1788, Randolph was one of the new Constitution's most effective supporters; it was ratified 89-79, and Virginia became the tenth state to ratify the Constitution.

3. Madison's *Notes*, p. 30.

4. Madison recorded this danger laconically: "...the prospect of anarchy from the laxity of government, and other considerations." *Notes*, p. 30.

5. The concept that the nation needed an executive power was not new. In his autobiography, Thomas Jefferson recounts how the Congress under the Articles of Confederation set up an executive council: "As the Confederation had made no provisions for a visible head of government, I proposed ... the appointment of a committee ... who should remain in session during the recess of Congress; and that the functions of Congress be divided into executive and legislative ... the former ... to be delegated to that committee." (Jefferson, Thomas, Autobiography, *op. cit.*, p.56.) Not only was the need for an executive clear at this point; so also was the desire for the executive to consist of a single person: "...a committee (was) appointed ... quarreled very soon, split into two parties, abandoned their post, and left the government without any visible head ... the same thing ... will forever take place in any Executive consisting of a plurality." (Jefferson, *op. cit.*, p. 56) However, Jefferson was not at the Constitutional Convention to give those sentiments; many delegates who were there did not trust the idea of a single executive: "The fetus of monarchy," cried Randolph of Virginia (*Notes*, p. 46), whose predisposition for a strong national government did not include a single executive. This was to emerge as the theme of this debate: an executive was needed, but were the delegates that far removed from the memory of British rule to trust a single man with that extensive power?

6. Madison's *Notes*, pp. 30-33.

7. *Ibid.*, p.33.

8. *Articles of Confederation*, article 2.

9. Madison's *Notes*, pp. 43-45, 115.

10. *Ibid.*, p. 118.

11. Randolph's amended resolutions are recorded in Madison's *Notes*, pp. 115-116. Paterson's resolutions are recorded in *Notes*, p. 118.

12. *Ibid.*, p. 120.

13. *Ibid.*, p. 121.

14. *Ibid.*, p. 122.

15. *Ibid.*, p. 122.

16. Characterization of Wilson found in Bowen, Catherine Drinker, *Miracle at Philadelphia*, Little, Brown, and Company, Boston, Mass., 1986, pp. 55-56.

17. Madison's *Notes*, p. 125.

18. *Ibid.*, pp. 125-126.

19. *Ibid.*, pp. 128-129.

20. *Ibid.*, pp. 128-129.

21. *Ibid.*, p. 129.

22. After the Convention adjourned *sine die* and the Constitution was before the people for ratification, Alexander Hamilton, James Madison, and John Jay, writing in New York newspapers, put forth their argument for the Constitution's adoption. One of the major topics discussed in this series of papers was the fear that the "single executive" would lead to monarchy and tyranny. Hamilton undertook to mitigate this fear, assuring his readers that, while an executive power was needed for the efficient operation of the new government, the one proposed did not cause the new government to cross the line from democracy to monarchy. The tone of these papers is much in keeping with his sentiments expressed in the Convention (of course, no mention is made of the fact that he had then proposed that the executive be appointed for life, and that the government as a whole be modeled on the British system). It is not surprising that Alexander Hamilton was the man chosen in the *Federalist Papers* to expound on the virtues of a strong executive. Hamilton wrote from a basic premise: "Energy in the executive is the leading character in the definition of good government." Having said that, he preceded to list how the power of the president would be limited by comparing his power to that of the King of England. The presidency is an elective office; the king inherits an hereditary position. The president would be subjected to impeachment; the king is not. The president would have a limited veto power, checked by the two-thirds override; the king's veto power was absolute. Interestingly, Hamilton then proceeded to explain the powers of the commander-in-chief: "It amounts to nothing more than the supreme command ... of the military and naval forces..." this was compared to the king's power to *declare* and *regulate* war; the corresponding powers in the new nation government would be the prerogative of the legislature. The president could adjourn the Congress only when both Houses could not agree on a day to adjourn; the king's power to dissolve Parliament is subject to no such restrictions. The president, again unlike the British monarch, was dependent upon the advice and consent of the upper house of Congress for treaty approval. The president needs the advice and consent of the Senate for his governmental appointments. Thus, with the preceding distinctions made clear, it appeared obvious to Hamilton that the rumors and fears that the presidency posed a threat to liberty due to its monarchial characteristics were misrepresentations of the truth.

While quick to point out the relative weaknesses of the presidency, Hamilton was quick to defend the principle of the vigorous executive. His ingredients for a effective executive were as follows: unity, duration, adequate provisions for its support, and, last but certainly not least, competent powers. In *Papers* 21-36, Hamilton, writing in a tone of near-contempt, delineates the critical weaknesses of the government under the Articles. As Hamilton writes, one senses his impatience at people who continue to oppose his view. On March 11, 1788, he finally explodes, writing that: "...I have taken the pains to select (a misrepresentation) as unequivocal proof of the unwarrantable arts which are practiced to prevent a fair and impartial judgement of the real merits of the Constitution... I hesitate not to submit it to the decision of any ... honest adversary, whether language can further

epithets of too much asperity for so shameless and so prostitute an attempt to impose on the citizens of America." Obviously, the strain of the campaign for ratification was taking an incredible toll on this man, who had grown to equate the formation of the new national government with the destiny of the nation itself. At any rate, the *Federalist Papers* show Hamilton's attempt to justify to the American people a strong executive power for the new government. (All quotes in this note come from Hamilton, Alexander, et al., *The Federalist Papers*, Bantam Books, Inc., New York, New York, 1982, [papers originally published 1787-1788,] Papers 21-36 and 67-70.)

23. Madison's *Notes*, p. 130.

24. *Ibid.*, p. 130.

25. *Ibid.*, pp. 130-131.

26. *Ibid.*, p. 131.

27. *Ibid.*, p. 131.

28. *Ibid.*, p. 131.

29. *Ibid.*, p. 131.

30. *Ibid.*, pp. 131-132.

31. *Ibid.*, p. 134.

32. *Ibid.*, pp. 134-135.

33. *Ibid.*, p. 135.

34. *Ibid.*, p. 136.

35. *Ibid.*, p. 139.

36. *Ibid.*, p. 140. The chapter as written gives the impression that only three plans of government were presented to the Convention: the plans of Randolph, Paterson, and Hamilton. To be historically accurate, it should be noted here that there was a fourth plan submitted. On May 29, 1787, the same day that the Randolph plan was introduced into the Convention, Madison recorded the following in his Notes: "Mr. Charles Pinckney laid before the house a draught of a federal government which he had prepared ... Mr. Pinckney's plan ... (was) referred to the Committee of the Whole appointed to consider the state of the American Union." There is considerable doubt as to the content of this "Pinckney Plan." The plan was never debated in the Convention; however, the editor of Madison's *Notes* indicated that it was used by the Committee of Detail in its report delivered on August 6, 1787. This plan, however, was never debated (or even referred to) in the subsequent Convention debate.

Of course, neither was the Hamilton plan debated extensively or voted on. However, the coverage of the three plans in the chapter was not done for the purpose of indicating their relative importance in the Convention's proceedings. They are presented here as

examples of the degree to which delegates were willing to strengthen a national Supremacy Clause in the U.S. Constitution. The treatment of the three plans in the text of the chapter fulfills that goal; however, to be historically accurate, it should be mentioned that there were four plans introduced into the Convention: the Randolph plan, the Paterson plan, the Hamilton plan, and the Pinckney plan. Of these four, two, the Randolph plan and the Paterson plan, should be considered the mst important in that they provided the framework for the major debate of the Convention. The Hamilton and Pinckney plans must be considered the least important of the two, since they were neither debated or voted upon. However, the Hamilton plan does have utility for this thesis in that it indicated to what degree some delegates were willing to strengthen the national character of the federal government.

37. *Ibid.*, p. 148.

38. *Ibid.*, pp. 298-299.

39. *Ibid.*, pp. 302-304.

40. Bowen, *op. cit.*, p. 42, contains the description of Gouverneur Morris as a strong nationalist.

41. Madison's *Notes*, p. 305.

42. *Ibid.*, pp. 305-306.

43. *Ibid.*, p. 379. The names of the members of the Committee are found in Bowen, p. 192. These five members were: Edmund Randolph of Virginia, James Wilson of Pennsylvania, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut, and John Rutledge of South Carolina. Forest McDonald in *E Pluribus Unum, op. cit.*, p. 270, in describing twelve delegates who possessed "...the idea of a great nation, and the ruthlessness and daring and the skill to make ideas into reality," included Wilson, Ellsworth, and Rutledge in that list. The predisposition for Randolph to support a nationalist plan is seen from his proposal of the Virginia plan; Gorham, who had been elected the chairman of the Committee of the Whole House, had expressed the desire to see the national Congress strengthened (Bowen, p. 35.) Thus, all five members of this committee had definite nationalistic leanings.

44. *Ibid.*, p. 380.

45. *Ibid.*, p. 390.

46. The unclear nature of the extent to which the government was to be federal and to which it was to be national was manifested in the document itself. The preamble of the Constitution states: "We the people of the United States ... "; the last paragraph of the document states: "Done in Convention by the Unanimous Consent of the *States* (emphasis added) present ... " The preamble seems to indicate that the government was created by the people (*i.e.*, a national government); the closing paragraph seems to indicate that the new government was a creation of the states (i.e., a federal government). Both of these wordings occasioned debate in the Convention. When the report from the Committee of Detail, as amended, was submitted to the Committee of Style and Arrangement, this latter committee (which also produced "the supreme law of the land" to replace "the supreme law of the respective states") changed the wording of the preamble. The preamble from the Committee

of Detail read: "We the people of the states of New Hampshire, Massachusetts, ... (*et. cetera*) ... do ordain, declare, and establish the following constitution for the Government of ourselves and our posterity." (*Notes*, p. 385) The Committee of Style and Arrangement changed it to its final form: "We the people of the United States (*Notes*, p. 616) This change was effected by Gouverneur Morris, a member of the Committee of Style and Arrangement (see Bowen, pp. 234-242, on the tremendous impact that Morris, due to his position on this committee, had on the final form of the Constitution; this chapter also lists the other member of the Committee of Style: William Johnson of Connecticut, Alexander Hamilton of New York, James Madison of Virginia, and Rufus King of Massachusetts.). Thus, the preamble was to have a nationalistic connotation. This occasioned little debate in the Convention (there is no record in Madison's Notes that it was even discussed at all), but the phrasing "We the people... " was to have a tremendously important effect in the battle for ratification, as the leading anti-federalists were to make much of the fact that this clause showed the new general government was to run roughshod over the states. (Bowen, p. 240)

The phrasing of the closing paragraph, however, was debated in the Convention. On the next-to-last day of the Convention, September 16, 1787, Madison recorded what, after so many months of frustrating work, must have been a pleasant entry: "On the question to agree to the Constitution as amended; all the states, aye. The Constitution was then ordered to be engrossed, and the House adjourned." The Constitution at that time made no mention of the mode in which it was to be signed. Was it to be signed by delegates as representatives of the people, or as representatives of the states? The next day, Benjamin Franklin handed James Wilson of Pennsylvania a speech to read for him. Franklin was well aware that some of the delegates were unhappy about the type of government they had created, and that they would, in turn, be hesitant to sign the finished document. Franklin, fearing "...if everyone of us in returning to their constituents were to report the objections he has to it, we might prevent it being generally received, and thereby lose all the salutary effects ... among foreign nations as well as among ourselves ... I cannot help expressing a wish that every member of the Convention who may still have objections to it, would, with me, on this occasion, doubt a little of his own infallibility and, to make manifest our unanimity, put his name to this instrument." (*Notes*, p. 654) It was obvious to Franklin that the major objection to the wavering delegates was the national aspect of the new government; therefore he then moved that the Constitution be signed in the form: "Done in Convention by the unanimous consent of the States present ... (*Notes*, p. 654). This motion passed, 10-0, with one state (South Carolina) equally divided.

This episode illustrates the difficulty that some delegates had in supporting a truly national government. The method of dealing with this philosophical split (*i.e.*, by proposing a form of signing that left the true nature of the government in doubt) was perhaps necessary to get a majority of the delegates to go along with the plan, yet the potential existed for a fatal ambiguity to creep into the operation of the Constitution. Those politicians who would later argue for the theory of state sovereignty could find many provisions in the Constitution, the supremacy clause notwithstanding, to support their arguments. On of those arguments, developed by John C. Calhoun and explored more deeply in a later chapter, rested upon the assumption that the federal government was a creation of the states; since the states created the federal government, this theory went, the ultimate decision as to whether the government should continue or not rested with the states themselves. Another curious fact about the convention was this: although the nationalists held the upper hand during the proceedings and the document that emerged greatly strengthened the powers of the national government, the mode of voting in the Convention was never changed from that employed by the Confederation Congress: *viz.*, each state, regardless of population, having only one vote.

Thus, the "We the People of the United States ... " vs. "Done in Convention by the unanimous consent of the states ... " dilemma was to plague the new nation, as compromises effected to ease the passage of the Constitution led to a dangerous ambiguity concerning the nature of the new government under that Constitution. The fact that the legislators in the first Congress saw a difference between the political entities of the states and their individual citizens can be seen from the wording of the tenth amendment to the Constitution, proposed by the first Congress: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, *or* (emphasis added) to the people. Thus, the "states" and the "people" are recognized as separate political entities.

47. This can be seen from the powers that the states were granted by the new Constitution. Article I section 8 reserved to the states the right to name all officers and train all the soldiers of the Militia. According to article I section 3, the principle of state equality would be observed in the United States Senate; this principle gains even greater importance when one realized the extent of the power granted exclusively to the Senate in section 3 of this article. Most importantly, a means of amending the Constitution that completely bypasses the national government is open to the states via Article V. Upon the application of two-thirds of the legislatures of the several states, Congress must call a convention for the purpose of amending the Constitution; upon ratification of the proposed amendments by three-fourths of the state legislatures, or by conventions in three fourths of the states, the proposed amendments can become part of the Constitution. Thus, an avenue is open to the states to completely alter the form of the national government completely independent of the national government.

48. Madison's *Notes,* p. 396. There were two mechanism whereby the Convention could consider a motion: either in convention, or in the Committee of the Whole House. The Committee of the Whole House was a parliamentary device that allowed measures to be discussed and voted upon in a non-binding manner; a member voting one way on a measure one day could easily change his mind and vote the opposite way the next. In England, when the Commons was in the Committee of the Whole, votes were not recorded; it was simply a way to get the sense of the assembly. When the delegates defeated Pinckney's motion to refer the Committee of Detail's report to the Committee of the Whole House, they were manifesting their desire that the convention and its product, the Constitution, be brought to completion more quickly by taking binding votes of the states in convention, as opposed to non-binding votes in the Committee of the Whole.

49. Madison's *Notes,* p. 517.

50. *U.S. Constitution,* article VI.

VII. JOHN C. CALHOUN AND FEDERAL SUPREMACY

A. INTRODUCTION

There exists a fundamental paradox about the American Constitution; that is, the ambiguity which is the Constitution's greatest strength, the ambiguity which underlies many of its provisions and gives it the flexibility to apply eighteenth century concepts of government to the problems of the twentieth, is simultaneously its greatest weakness.[1] No ambiguity posed a more serious danger to the new federal government than did the unclear demarcation lines between spheres of sovereignty exercised by the federal and state governments. While the government was still in nascent form it was presented with a serious challenge to federal supremacy[2]; in its first major war since the Revolution, it was faced with a secession crisis[3]. Even as the new federal government was riding the high tide of nationalism, even as Chief Justice Marshall was carving out in the nation's jurisprudence a widening and expanding role for Washington in the affairs of the nation, this troubling undertow of state resistance to federal encroachment into areas previously thought to be the sole province of the states was proving dangerous. These questions of dual sovereignty, questions of grave importance upon which the Constitution was silent, struck at the very nature of the federal government. A satisfactory answer to this problem had not been forthcoming in the summer of 1789. Could the next generation of American statesmen settle the dilemma?

The nature of the problem of dual sovereignty was particularly acute in the democracy of the new American republic. A fundamental problem in a democracy, a system in which the majority rules, is the protection of the rights of a political minority against the rule of the majority. This was not an insight that originated with the establishment of democracy in America; indeed, the French political philosopher Charles Montesquieu postulated that for a democracy to be viable,

for the minority in the system to be held to the smallest possible number, its size must be limited.[4] This concept was deemed to be so dangerous to the ratification of the new Constitution that it was attacked vigorously by James Madison in the Federalist Papers.[5] This tendency towards resistance of federal authority by the use of the theory of state sovereignty was particularly dangerous in the new American republic due to the fact that the political minority grew to be defined less and less in terms of political philosophy and more and more in terms of sectional geography. Thus, the purely political controversy concerning the Alien and Sedition Acts was settled in a contest between the Federalists and Republicans in the election of 1800[6]. The Hartford Convention, while displaying a slight sectional tint, again was mainly a struggle between competing political philosophies[7]. By the time the Nullification Crisis struck, the contest had lost most of its political flavor and began to take on a more sectional tone.[8] This was an ominous development, as the aggrieved minority lost its political manifestation and came to identify itself not with a political party, but with a region of states. This was important not in the sense of Montesquieu's or Madison's theory; in theory, the minority cast in a democracy can be defined either in political or sectional terms. However, this distinction between political and sectional minority had immense practical importance, especially in America, a country with a strong tradition of state sovereignty. The practical importance was this: it would be irrelevant if a political party were to decide to secede from the Union; conversely, it would be disastrous if a group of states attempted it. Thus, the Nullification Crisis, with its sectional character, posed a unique danger to the Union.

Every political movement needs a philosopher. Anyone who would threaten to destroy a Union so hallowed, so revered, with two of its major founders so recently in their graves, would strongly feel the need for intellectual justification.[9] The philosophers behind the Virginia and Kentucky resolutions, Thomas Jefferson and James Madison, were in no way inclined to lead their state of Virginia out of the federal Union[10]; the leaders of the Hartford Convention had no intellectual force equal to the two Virginians behind their movement. Yet, in the situation in South

Carolina between 1828 and 1833, a nullification movement met with a philosopher who had both the intellectual capacity to justify the movement and the political convictions to carry it through: the Vice-President of the United States (and later U.S. Senator from South Carolina), John Caldwell Calhoun.

The history of the nullification crisis makes for interesting reading[11]; similarly, the character and motivations of John C. Calhoun are fascinating.[12] Yet, for the purposes of this paper, only the reasoning of Calhoun in his justification of nullification will be examined. This will be accomplished by examining three documents which Calhoun wrote: the Fort Hill Address of July 26, 1831; and the Disquisition on Government and a Discourse on the American Constitution, both published posthumously. As Calhoun laid out his reasoning for nullification, he was forced to reconsider the true nature of the American republic. The old questions of ultimate sovereignty, of states' rights, and of federal supremacy would again be raised; in addition, in his later writings, Calhoun will expound on the need for a mechanism within the framework of democracy to protect the rights of a minority constituency. In this reasoning process, Calhoun rejected the theory advanced by Madison in the Federalist Papers of the "extension of the sphere" as protection for a minority, and he instead advanced the theory of a "concurrent majority" as the only true safeguard of a minority in a majority-rule system. In doing so, he struck a major blow at the foundation of the American democracy; after his death in 1850, his southern disciples would use his reasoning as justification for a revolution against the idea of federal supremacy. As the smoke cleared from the bitter decade of the 1850s, and as a member of the Republican party stood poised for ascension to the Presidency, the leaders of the South would finally be ready to put the theories of Calhoun into practice. The battle in 1789 in the Philadelphia Convention over the question of federal supremacy and the nature of the government, though at times sharp, had proven to be bloodless. The battle that was to ensue over the theories of John C. Calhoun cannot claim that happy distinction. Thus, through the mechanisms of these three papers which Calhoun wrote, one can trace Calhoun's evolution from a philosophy of nullification attempted within the

Constitutional framework to a philosophy of the "concurrent majority," which could only have been attempted through the amendment of the Constitution to incorporate his doctrine. Given that the expositions on government and the Constitution were written during times of increasing sectional strife, and given that, therefore, the possibility of incorporating this philosophy through Constitutional amendment was almost non-existent, these expositions can be viewed only as justification for a section that was beginning to view itself as a permanent minority to leave the Union that had relegated it to that permanent status.

B. THE FORT HILL ADDRESS

The Fort Hill Address, written while Calhoun was still the Vice-President, was the first public linking of Calhoun's name to the theory of nullification. The first part of the letter dealt with the nature of the federal government; *viz.*, what was the agency that created the federal government? Was it the people of the nation? Or were the principles to the contract which was the Constitution the states themselves, acting in their capacity as sovereign entities? Calhoun answered that it was the states which created the federal government, not the people: "The great and leading principle is, that the General Government emanated from the people of the several States, forming distinct political communities, and acting in their separate and sovereign capacities, and not from all the people forming one aggregate political community; that the Constitution of the United States is, in fact, a compact, to which each state is a party, in the character already described."[13] Having put forth this principle in which the states as sovereign entities created the federal government, there was but one logical conclusion to draw concerning the right of a state to nullify a federal law it deems unconstitutional: "This right of ... nullification ... I conceive to be the fundamental principle of our system ... and I firmly believe that on its recognition depend the stability and safety of our institutions."[14] Thus, in the first paragraph of his letter, the Vice President of the United States went on record as defending the right of a state to nullify a federal law, and then, in a thinly veiled warning of secession or violence directed

towards those who would seek to impose federal supremacy on the recalcitrant state, he threatened the "stability and safety" of the federal government.

It is difficult to understand Calhoun's promotion of a doctrine which so obviously contradicts both the letter and intent of the supremacy clause of the Constitution. Calhoun was not ignorant of the intellectual foundation of the nation's government; born in the South, nevertheless he received his principal education in Northern institutions, first as a student at Yale University and later in law school at Litchfield, Connecticut. His understanding of the meaning of federal supremacy within the framework of the Constitution was demonstrated by his next main point, in which Calhoun, in arguing for the right of nullification for the states, left the framework of the U.S. Constitution, which provided him little leeway for maneuver concerning this subject, and instead embarked upon an examination of the British model: "Whenever separate and dissimilar interests have been separately represented in any government experience and wisdom have devised but one mode by which such political organization can be preserved--the mode adopted in England ... to give to each co-estate the right to judge of its powers, with a ... veto on the acts of the others ... "[15] Having strayed from the point which he had to make (specifically, how did the U.S Constitution justify nullification), Calhoun then turned to that document to put forth his next argument that the states were coequals in sovereignty to the federal government. He pointed out that the states indeed can amend the Constitution independent from a mandate by the federal government; that power is found in article five of the Constitution. Calhoun wrote: "The states themselves may be appealed to three-fourths of which, in fact, form a power whose decrees are the Constitution itself ... "[16] These arguments, in fact, formed the weakest section of Calhoun's argument. In the argument concerning the states' ability to amend the Constitution, it was a wide chasm of logic (a chasm which Calhoun's argument failed to bridge) between one state nullifying a federal law within its borders and three-fourths of the Union demanding a change within the Constitutional framework. His argument overlooked historical precedent: the twelve amendments to the Constitution which had been ratified by 1820,

including the tenth amendment which reserved certain powers to the states, had all been proposed by Congress (in the other Constitutional mechanism for amendment), not by the states. Calhoun's attempt to justify nullification had instead turned into an exposition on the theory of an entirely different framework for the federal government. Yet, Calhoun did not see it this way; he still proposed that this power of nullification could be invoked within a Constitutional framework. As evidence of the fact that he believed his proposal could be implemented in such a manner, it can be noted that Calhoun was quick to deny that he was seeking a major change; he asserted that he was, in fact, being true to the actual spirit of the founders: "I have examined with utmost care the bearing of the doctrine (of nullification), and, so far from being anarchial or revolutionary, I solemnly believe it to be the only solid foundation for our system, and that the opposite doctrine ... which would vest in the general government the right of determining, exclusively and finally, the powers delegated to it is incompatible with the ... Constitution itself..."[17]

With the publication of the Fort Hill Letter, and the resulting nullification crisis of 1832,[18] Calhoun resigned the vice-presidency and went back to South Carolina, whose legislature quickly elected him to the United States Senate. After a short stint as Secretary of State in the cabinet of President John Tyler, Calhoun was again elevated to the Senate, where he served until his death on March 31, 1850. It was during this second period of service in the Senate that Calhoun turned his attention to the drafting of a more extensive exposition on the nature of government in general, and on the nature of the government of the United States in particular. The resulting Disquisition on Government developed the philosophical framework, in which Calhoun's theory of the "concurrent majority" grew to fruition.

C. THE DISQUISITION ON GOVERNMENT

In Calhoun's theory, man is a social being with a natural inclination to join together in a society. Thus, he wrote: "...I assume as an incontestable fact that man is so constituted as to be a

social being. His inclinations and wants ... impel him to associate with his kind."[19] The formation of this society, however, does not complete the socialization process; a government must also be formed. Calhoun found the driving force behind this formation of government: the natural inclination of one to feel the result of external circumstances in a personal rather than a societal context. "...while man is created for the social state and is accordingly so formed as to feel what affects others as well as what affects himself, he is, at the same time, so constituted as to feel more intensely what affects him directly than what affects him indirectly through others..."[20] Therefore, the nature of man begat the society, and, subsequently, the nature of man in society begat the concept of government.

Where Calhoun's theory departed from those of philosophers such as Jean-Jacques Rousseau, John Locke, and Thomas Jefferson was in its rejection of the theory of the existence of man in the state of nature. According to this prevailing school of thought, a school which had enjoyed great success in America as a foundation of the American Revolution, man left the state of nature and entered of his own free will into society; in entering this society, he voluntarily relinquished the larger portion of his "natural rights" (the rights to life, liberty, and property excepted). In this formation of society was founded the "social contract" between man and his society; specifically, in the voluntarily relinquishing of natural rights and the subsequent formation of society was formulated a contract between the individual person and society. Consequently, as the society was founded on the social contract, so was the relationship between the society and its government founded on a contract. Thus, man in relation to his government still possessed the fundamental rights of the state of nature (life, liberty, and property). Calhoun rejected this idea of the "state of nature," saying man had never existed in such a state:[21] "...man is so constituted as to be a social being ... he has, accordingly, never been found, in any age or country, in any state other than social. In no other (state), indeed, could he exist ... it is difficult to explain how an opinion (that man existed in the state of nature prior to socialization) so destitute of all sound reason ever could have been so extensively entertained ... nothing could be

more unfounded or false."[22] Therefore, the government was not instituted among men as the result of a social contract, since man did not form society with a social contract. On the contrary, the society was not "formed" by anyone; it always existed. Government was instituted among the members of the society, not as the result of a contract, but rather as the result of the selfish nature of man, a nature which would preclude men from ever living together in society. "And hence the tendency to a universal state of conflict between individual and individual (in society), accompanied by the connected passions of suspicion, jealously, anger and revenge--followed by insolence, fraud, and cruelty--and, if not prevented by some controlling power, ending in a state of universal discord and confusion... This controlling power ... is *government.*"[23]

Calhoun was pessimistic, however, concerning the nature of government; though it was instituted to protect man from the ruling passions of selfishness, it is managed and effected by men themselves subject to those same passions. Therefore, government, if left to its own devices, would fail to accomplish its only mission: the protection of each individual under its jurisdiction from the destructively selfish application of individual initiatives aimed at personal gain. "But government, although intended to protect and preserve society, has itself a strong tendency to ... abuse of its powers ... the cause is to be found in the same constitution of our nature which makes government indispensable. The powers which it is necessary for government to possess ... must be administered by men in whom ... the individual are stronger than the social feelings."[24] Thus, government, to accomplish its intended mission, must in some way be limited to prevent this abuse of power. Calhoun found the answer in the forming of constitutions. "That by which this (abuse of power) is prevented, is what is meant by *constitution* ... the constitution stands to government as government stands to society ... "[25]

This theory of constitutional nature lent itself nicely to the theory of "strict construction" of the Constitution and placed Calhoun in diametric opposition to the theory of implied powers so eloquently expressed by John Marshall in *McCulloch vs. Maryland.* According to this theory, a

government instituted by a society is strictly limited in its powers to the specific grants of authority contained in the constitution by which authority it operates.

Having developed the idea of a constitution as a document whose importance is found in the limits it puts on government, Calhoun then moved to develop the concepts that should be contained in such a constitution. He began by asking the question: how can the government be constituted to counteract the tendency of the rulers of a nation from abusing the ruled? In the development of this theme, Calhoun first broached a concept that would become very important in his later development of the "concurrent majority." This concept was the inadequate protection afforded all the members of the society by the principle of suffrage. The fact that every member of the society had an equal voice in the election of a government was not sufficient to prevent governmental abuse of power. This inadequacy stems from the fact that, as society expands, different interests arise among the members of a common society. "If the whole community had the same interests so that the interests of each and every portion would be so affected by the action of the government (equally), the right of suffrage ... would be all-sufficient to counteract the tendency of government to oppression."[26] However, this homogeneity of effect was not possible. Calhoun stated: "But such (equal effect of laws) is not the case. On the contrary, nothing is more difficult than to equalize the action of the government in reference to the various and diversified interests of the community."[27] Calhoun took this theory that universal suffrage does not guarantee safety to various factions in a nation one step further; not only does suffrage not protect the rights of various factions, it virtually guarantees that one major segment of a democracy's population will be held in perpetual subjugation. This will occur, according to Calhoun, as various factions, in order to advance their own interests, will combine their power and exercise it against a now numerically inferior section. This process will evolve slowly, yet the effects of this evolution are not rendered any less invidious by its slow pace:

> ...a struggle will take place between the various interests to obtain a majority in order to control the government. If no one interest be strong enough ... a combination will be formed between those whose interests are most alike ... The process may be slow, and

> much time may be required ... but ... once (this combination is) formed, the community will be divided into two great parties--a major and a minor--between which there will be incessant struggles ... to obtain the majority and, thereby, the control of the government...[28]

Calhoun, having laid the foundation for his argument that universal suffrage leads to an abuse of governing power in that it creates a political minority whose rights can not be protected, then moved to the next obvious question: if suffrage is universal, and there is a tendency in factions to form combinations whose fluid nature prevents them from ever becoming permanent, then will there not be a possibility that the minority, with skillful political maneuvering, can become part of the majority? Calhoun answered that this political shift was indeed possible, but that the very tenuousness of majority power will cause the political power gained by that majority to be exercised in a manner more ruthless than that experienced in a monarchy or aristocracy. Thus, for the political minority, the period during which it holds the junior status in the government will be intolerable:

> ...the minority, for the time, will be as much the governed or subject portion as are the people in an aristocracy ... or monarchy. The only difference in this respect is that in the government ... the minority may become the majority ... But the uncertainty of the tenure by which power is held (by the majority) cannot, of itself, counteract the tendency in government to oppression and abuse of power. On the contrary, the very uncertainty of the tenure ... would rather tend to increase than diminish the tendency towards oppression.[29]

If universal suffrage was not the protection which a minority could seek to guarantee its rights, then what was the answer? Calhoun response to that question was: the concurrent majority. "This ... can be accomplished only in one way ... by dividing and distributing the powers of government, giv(ing) to each division or interest ... either a concurrent voice in making and executing the laws or a veto on their execution."[30] It is through this mechanism of the concurrent majority alone, Calhoun proposed, that a minority could truly protect its rights; even a written constitution, he argued, was insufficient to the task: "By (loose construction of its provisions or by disregarding its limits on federal power), the restrictions (of the Constitution) would ultimately be annulled and the government be converted into one of unlimited powers."[31] The principle of separation of powers, while effective in providing a slight rein on the power of the federal

government, was itself also insufficient to protect the minority. "Such a division (of powers) may do much to facilitate (the government's) operation and to secure in its administration greater caution and deliberation; but as each and all of its departments... would be under the control of the numerical majority, ... a mere distribution of its powers ... could do little or nothing to counteract its tendency to oppression and abuse of power."[32] Thus, Calhoun made the argument that the government under the Constitution as it was then written was insufficient for the protection of the southern minority. The very fact that the federal government was limited by the Constitution in the exercise of its powers by both specific clauses of the document and by the careful diffusion of power throughout the three branches of government would only impede, not prevent, the establishment of a majority despotism over the South.

In the comparison between Calhoun's Fort Hill Address and his Disquisition on Government, one can see the evolution in his thinking concerning the nature of the government. In the Fort Hill Address, written while he was still the Vice-President, Calhoun retained some hope of compromise within the Constitutional framework. Though the concept of nullification was a concept that seemed to run afoul of the supremacy clause, Calhoun saw the possibility of it being integrated with the existing governmental structure, producing a mechanism whereby each state could protect itself against the possible tyranny of the federal government. By the time he written his Disquisition on Government, Calhoun had obviously lost faith in the Constitutional system in that he no longer saw any protection within that system for a section destined to be a political minority. Therefore,in keeping with that determination, he proposed a system that would have required a major constitutional revision to implement. The principle of the concurrent majority had been developed in the Disquisition on Government. The constitutional mechanism which would enshrine the principle of the concurrent majority in the government of the United States was covered by Calhoun's Discourse on the American Constitution.

D. THE DISCOURSE ON THE AMERICAN CONSTITUTION

The Discourse dealt with two major themes; the first major theme was the nature of the federal government. Calhoun saw that nature as federal, not national: "(The government) is federal ... in contradistinction to national ... It is federal because the government of the states united in a political union, in contradistinction to a government of individuals socially united ... it is federal and not national because it is the government of a community of States, and not the government of a single state or nation."[33] Calhoun dealt with the problem posed by the wording of the preamble; did not "We the People" impart a national character to the government? Calhoun dealt with this objection by the simple re-definition of the phrase: "The process preparatory to the ratification and the acts by which (ratification) was done prove beyond the possibility of a doubt that ... We the People of the United States mean(s) We the People of the several States of the Union. The inference is irresistible."[34] Again and again, Calhoun hammered home this concept of the federal nature of the government: "Taken all together, it follows from what has been stated that the Constitution was ordained and established by the several states as distinct, sovereign communities, and that it was ordained and established by them for themselves - for their common welfare and safety, as distinct and separate communities."[35]

In his development of the historical basis for his theory concerning the nature of the government, Calhoun had a wealth of historical evidence on his side. It was true that, in the formative stages of the republic, the concept of state sovereignty was paramount. In the Confederation Congress, whose writ gave the Constitutional Convention political legitimacy, the principle of "one state, one vote" had always reigned supreme. Indeed, the Articles of Confederation had made explicit the fact that the new Union was to be one of sovereign, independent states. The delegates to the Convention of 1787 had voted by states, not as individual representatives of the people. A remnant of the principle of state sovereignty was retained by the federal legislature in the equality of representation of the states in the Senate. The phrase "We the People," the one which gave Calhoun so much trouble, was developed by the Committee of Style

and never brought to a vote on the floor of the Convention. The wording of the closing paragraph of the Constitution ("Done in Convention by the unanimous consent of the states present") certainly lends credence to Calhoun's argument for the federal nature of the government. Thus, Calhoun's theory of the federal quality of the government was firmly based in historical precedent.

Yet if Calhoun did not commit the sin of historical commission, then he could certainly be accused of committing the one of historical omission. Completely ignored in his discourse is the depth of the nationalist sentiment which pervaded the Constitutional Convention; this was a sentiment which, in large part, was occasioned by the experience of a weak national government faced with thirteen separate sovereigns with a veto on its actions. There is no mention of the supremacy clause in Calhoun's argument, yet the debates of the convention lend evidence to the fact that this clause was fashioned with just this national-state question in mind (see chapter 5). Thus, while Calhoun's arguments were based in historical fact, this basis of fact can be considered very selective.

The more fundamental flaw in Calhoun's argument was that it ignored almost sixty years of American Constitutional development. The U.S. Constitution is unique in that it provides only the bare framework for the mechanics of government. Its provisions designed to protect and promote liberty are as permanent and inflexible as those dealing with the mechanism of governing are fluid and flexible. This question concerning the federal nature of the government had arisen as early as Washington's first administration. The answer to this question was not destined, under the form of government created by the Constitution, to be forthcoming in a single pronouncement from the political party that happened to be in power at the time. The answer to this question would come from a slowly evolving process of maturation; as the government expanded its influence, it would come into conflict with competing claims of sovereignty issuing from the states. These questions had been brought up before in the history of the nation (indeed, this process continues to this day), and the slowly evolving consensus that was emerging seemed to

favor the national government at the expense of the states. Calhoun could find no sectional conspiracy in this process of evolution; indeed, during the nullification crisis, a Tennessee slaveholder had been sitting in the White House. In developing a jurisprudence that favored the national government at the expense of the states, the Supreme Court had been led by a Virginian. Nine of the first twelve presidents (Washington, Jefferson, Madison, Monroe, Jackson, Harrison, Tyler, Polk, and Taylor) had been born south of the Mason-Dixon line. The South had enjoyed legislative influence in the national government out of proportion to its smaller population, especially in the Senate. Therefore, taking this process of political evolution into account and recognizing its paramount importance in the American scheme of government, Calhoun's disregarding of that process, his reliance on harking back to eighteenth-century political theories to resolve nineteenth-century problems, can be considered the greatest weakness of his argument. The second major theme of the discourse was the development of the mechanism by which Calhoun's theory of the concurrent majority could be implemented in the American government: a plural executive. This was an old idea, resurrected by Calhoun, that had been rejected by the Constitutional Convention in 1787.[36] In proposing the plural executive, Calhoun left the realm of theory and framed his argument in the context of the sectional crisis of his day:

> (Preventing the disruption of the Union) cannot be done by restoring the government to its federal character ... what has been done cannot be undone. The equilibrium between the two sections has been permanently destroyed ... The nature of the (problem) is such that nothing can reach it, short of some organic change--a change that will ... modify the Constitution ... it may be doubted whether the framers of the Constitution did not commit a great mistake in constituting a single instead of a plural executive. It may even be doubted whether a single Chief Magistrate ... is compatible with the permanence of a popular government ... (a plural executive) would make the Union a union in truth ... and not a mere connection used by the stronger as the instrument of dominion (over) ... the weaker."[37]

Calhoun then concluded his Discourse on a pessimistic note. Speaking of the South's resolve to remain in the Federal Union, Calhoun noted that there were only two reasons why the South was still part of the United States: "...the lingering remains of former attachment and the fading hope of being able to restore the government to what it was originally intended to be, a blessing for

all."[38] Calhoun was advancing his proposition for a plural executive within a context of ever-increasing sectional strife; he knew the possibility of obtaining a 2/3 majority in both Houses of Congress, not to mention a 3/4 majority of the various state legislatures, to agree to such a constitutional amendment would be remote. Therefore, the Discourse on the American Constitution can be viewed, not as a plea for change, but rather as the justification for the final step of secession. History was to prove this interpretation valid.

E. CONCLUSION

What lessons do the writings of John C. Calhoun have for planners today who contemplate the possibility of sovereign entities within a single nation defying their national government and embarking on the path towards secession? The answer lies in the nature of the conflict to which Calhoun was addressing his theories. In any system composed of a confederation of sovereign entities, such as the United States was at its founding, the national component of the government will be granted the power (sometimes checked or limited by Constitutional provisions or governmental practices, but usually present in some form) to exercise supreme sovereignty over the lesser political entity. This provision will lead to some degree of friction between the two sovereigns; if there is no Constitutional provision to deal with this situation, or the Constitution appears vague on the subject, this friction between sovereigns could erupt into open conflict. The degree to which the national sovereign resists the attempts of the lesser political entity to exert a degree of sovereignty, the greater the potential for further conflict. As the writings of Calhoun show, there is no compromise solution to be found between sovereigns if the sovereign to whom the supreme power has been delegated refuses to negotiate. Even when Calhoun attempted to stay within the Constitutional framework with his theory of nullification, the impossibility of that task soon became apparent. His writings after South Carolina suffered the humiliation of the nullification crisis in 1832 show that Calhoun had rejected the idea of a peaceful compromise with the federal government lacking a constitutional amendment which would change the fundamental

character of the government. If the experience of Calhoun and other southern leaders of the 1840s and 1850s holds any lessons for planners of today, it is this: a strong conviction of unfairness and inequality within a confederation, coupled with a strong tradition of political independence and a political machinery which makes the task of resistance that much easier, a faction of that confederation has a strong tendency towards disunion. The initial phases of that process consist of philosophical justifications for the independence movement coupled with an attempt at negotiations for the opportunity for the exercise of a more autonomous sovereignty over matters of local concern. The response of the supreme sovereign at this point is crucial. A willingness to negotiate at this point, with generous concessions in the area of local autonomy, could forestall a secession movement. But, as the episode with the South showed, an inflexible response to a section's demands for greater sovereignty, coupled with a national policy which increases the feelings of abuse and exploitation within the affected region, constitute an atmosphere where secessionist sentiment will thrive. The probability that the supreme sovereign will consent to relinquish a large portion of its power is remote; as Abraham Lincoln noted: "It is safe to assert that no government proper ever had a provision in its organic law for its own termination."[39] History teaches us that a supreme sovereign, in conflict with a lesser sovereign, is loathe to relinquish any meaningful degree of sovereignty to the lesser political entity. When this refusal is addressed to a political minority who nevertheless has the attributes for nationhood and a functioning political process, the danger of secession is great. If the supreme sovereign has the military might to try to impose the force of its laws by armed conflict, and the lesser political entity has the military might to resist, the potential for armed conflict is almost overwhelming. That was the case in the southern experience of secession, an experience for which John C. Calhoun was the leading philosopher.

CHAPTER VII ENDNOTES

1. This ambiguity mentioned here was not incorporated into the Constitution by accident. Many delegates at the Constitutional Convention recognized the benefits from a process which allowed for a gradual Constitutional adjudication of many of the specific problems caused by the Constitution's lack of clarity in key provisions. For example, in response to a delegate's complaint that the provision giving the federal legislature the right to legislate in "all cases where the separate states are incompetent" was vague in that the term "incompetent" was left undefined, Nathaniel Gorham, a Massachusetts nationalist, replied: "The vagueness of the terms constitutes the propriety of them. We are now establishing general principles to be hereafter extended into details which will be precise and explicit." (Madison, James, *Notes, op. cit*, p. 298). Whether Gorham meant that the details would be made clear later by the Convention or later by subsequent political generations is unclear; what is clear is that many of the ambiguities which preceded U.S. Constitutional crises in the years subsequent to 1787 stemmed directly from the Convention delegate's inability to resolve conflicts with a decisive degree of finality. This attitude that "the details will be worked out later" did prove to be successful in most constitutional adjudications of the various questions which faced the federal government in subsequent years (*e.g.*, the question of a National Bank in the first administration of George Washington.) Yet, concerning this fundamental question of the demarcation line between federal and state sovereignty, more guidance from the original Convention may have been helpful. At any rate, this ambiguity spoken of here did not go unnoticed by the framers of the Constitution.

2. This crisis was the result of the Alien and Sedition Acts passed during the Administration of President John Adams. In response to the perceived unconstitutionality of the Acts, the state legislatures of Virginia and Kentucky passed resolutions asserting the right of the states to void federal laws they deemed unconstitutional. In the Kentucky resolution of November 16, 1798, which was actually written by Thomas Jefferson, the legislature declared: "... that the several states composing the United States of America are not united on the principle of unlimited submission to their general government ... (the states) delegate to the general government certain definite powers, reserving each state to itself the residuary mass of right to their own self government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force ... the government created by this compact was not made the exclusive or final judge of the powers delegated to itself ..." (Resolution of Kentucky State Legislature, November 16, 1798.)

   The Kentucky resolutions, though dealing with the narrow issue of the unconstitutionality of the Alien and Sedition acts, also sought to explore the broader question of the federal/state relationship. The third resolution proposed an interesting interpretation of the tenth amendment to the U.S. Constitution, which had been ratified almost eight years earlier. This amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Jefferson read this amendment as vesting in the states, and not the federal judiciary, the power to enforce the provisions of the other nine amendments which make up the bill of rights: "...that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution,

... all lawful powers respecting the same did ... remain, and were reserved to, the states or to the people ... " Jefferson therefore held that any violation of the first amendment (Jefferson accused the Sedition Act of violating the freedom of the press clause of the first amendment) was a matter for the states to correct; further, Jefferson held that it was not merely a case of competing jurisdiction between the states and the federal government; rather, the federal judiciary was absolutely barred from exercising jurisdiction over matters regarding the first amendment since Congress was prohibited from making any law or regulation concerning freedom of religion, press, or speech. Jefferson seemed to view the prohibition from abridging these rights as carrying over into the realm of enforcing these rights: "...a more special provision has been made by one of the amendments to the constitution which expressly declares that Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, thereby guarding in the same sentence ... the freedom of religion, of speech, and of the press, insomuch that whatever violates either ... (is) withheld from the cognizance of Federal tribunals." (Kentucky Resolutions, third resolution.)

The seventh resolution departed completely from a discussion of the particular Sedition and Alien Acts and instead was concerned with the general conduct of the federal government in the exercising of its powers. In this resolution, Jefferson took up the argument which he had lost to Alexander Hamilton as Secretary of State in Washington's cabinet regarding the Bank of the United States (see chapter 4, endnote 12). It is the classic argument for so-called "strict construction" of the Constitution: "Resolved, that the construction applied by the general government (as evidenced by sundry of their proceedings) to those parts of the Constitution ... which delegate to Congress the power to lay and collect taxes, duties, imposts, and excises ... and to make all laws which shall be necessary and proper for carrying into execution the powers vested ... in the government goes to the destruction of all the limits prescribed to their powers by the Constitution. That words meant by that instrument to be subsidiary only to the execution of the limited powers ought not to be so construed as themselves to give unlimited powers (Kentucky Resolutions, Resolution 7). Thus, Jefferson's complaint about the unconstitutionality of the Alien and Sedition Acts and his mechanism of state power to rectify their abuses of civil liberty were but surface manifestations of a more deeply held feeling that the federal government had departed from its limited charter and had embarked upon a plan to expand its powers into the areas which he thought should remain the province of the states.

Having discussed both the particular unconstitutionality of the Alien and Sedition Acts and the general actions of the federal government which the state legislature thought had stretched the elastic clause a little too far, the last resolution, the ninth, dealt with the nature of the resolutions themselves: were they merely the representation of a state exercising a right of judicial review (This would be an action which would seem to be contrary to the supremacy clause; yet the Supreme Court had yet to arrogate unto itself the privilege of judicial review, so the argument was not as radical in 1798 as it would seem today.), or were they a call for disunion? The words "nullification" or "secession" do not appear in the ninth resolution; indeed, the tone of this resolution was conciliatory. Yet, there was contained in this final resolution a threat, heavily veiled in both conciliatory tone and dense rhetoric, to leave the Union if the federal government did not conform to the tenets of limited government: "The Governor of this Commonwealth ... is hereby authorized ... to communicate the preceding resolutions to the legislatures of the several states ... this Commonwealth is determined, as it doubts not its co-states are, tamely to submit to undelegated ... powers in no ... body of men on earth ... and (this commonwealth) doubts not that the sense (of the several states) will be so announced as to prove their attachment unaltered to limited government ... and that the rights of their co-states will be exposed to no dangers by remaining embarked on a common bottom with their own ... " The

resolution, while expressing confidence that the states will see the situation similarly, says nothing about 1) if the other states do not share the same sentiment, or 2) if the other states do share the same sentiment but the federal government refuses to adhere to the limited government doctrine. It is in these instances, not covered by this resolution, that the threat to disunion posed by the Jefferson through the Kentucky legislature lies; in this interpretation, it is in what is left unsaid by the resolution that its true meaning lies; that is, the threat of disunion from a nation in which the national government continually seeks to expand its jurisdiction over the states. The lack of directness in addressing the possible contingency of secession can be explained by either Jefferson's timidity in proposing such a drastic step or by the fact that Jefferson and the legislature truly believed that the federal government, when confronted by concerted action by the states in this matter, would indeed adopt policies more sympathetic to the states' concerns.

The fact that Jefferson authored these resolutions gives further insight into their ultimate purpose. It is hard to imagine that Jefferson would act to torpedo the federal government while it was still in its nascent form. Indeed, he was the Vice-President when these resolutions were debated and passed. (Of course, being vice-president did not ensure a man's loyalty to the Union; Aaron Burr, John C. Calhoun, or John Breckenridge all held the office at one time, and none of these men is remembered for unwavering love of the Union.) Jefferson, as a student of the philosophy of Locke, knew that one manifestation of tyranny was not an excuse for revolting against a nation's government; Locke postulated that it would take a series of usurpations and tyrannical actions on the part of a nation's rulers before the people would be sufficiently moved to take action. Yet, given these tendencies towards political moderation that seem to have been present, there also exists evidence early in Jefferson's career of his tendency to hide his authorship of documents that could be considered potentially treasonous. He noted in his *Autobiography* that illness had precluded him from delivering a copy of his revolutionary "A Summary View of the Rights of British America" to the American Congress sitting in Philadelphia (Jefferson's Autobiography, contained in *The Life and Selected Writings of Thomas Jefferson, op. cit.*, pp. 10-11.) Expanding on this theme, other authors have noted Jefferson's "convenient illness" at the time of this critical Congress (see, for example, Wills, Gary, *Inventing America,* Vintage Books, New York, New York, 1978, pp. 16-17). Therefore, since Jefferson did not publicly acknowledge his authorship of these resolutions, and given the fact that he had previously felt compelled to hide his authorship of potentially radical political tracts, one could conclude that he felt that the resolutions that were passed by the Kentucky legislature could, if carried to their logical conclusion, be used in justifying a secession movement.

Two other factors must be taken into account when assessing the motivation of Jefferson in proposing these resolutions. First, he would not hide his authorship for the sole purpose of sparing the president, John Adams, any political embarrassment; the two men, once allies in the cause for independence, had become bitter political enemies. Correspondence between the two, which had begun in May of 1777 and had continued unabated for almost two decades, came to an abrupt end on the 28th of December in 1796. (Cappon, Lester J., (ed.), *The Adams-Jefferson Letters,* The University of North Carolina Press, Chapel Hill, N.C., 1988). The political ill-will generated between the two men was to such an extent that it was not until 16 years later, three years after Jefferson had served out his second term as president, that the two men were again on speaking terms. Jefferson's victory over Adams in the election of 1800, the first transfer of political power between two political parties in the nation's history, was deemed so important to Jefferson and his followers that they dubbed his election "the Revolution of 1800"; more seriously, the Republicans threatened civil war if the election of Jefferson in the electoral college was negated by the Federalist-controlled House of Representatives, into which the election had

been thrown by the tie in electoral votes between Jefferson and the republican vice-presidential candidate, Aaron Burr. Therefore, the anonymity behind which he hid in publishing these resolutions could not have been the result of a desire to spare John Adams any political embarrassment.

Secondly, and more importantly as far as Jefferson's motives were concerned, were Jefferson's feelings about the Alien and Sedition acts against which most of the Kentucky resolutions argued. Jefferson saw these acts as striking at the very foundation of representative democracy. Responding to Abigail Adams' complaint that he had pardoned men convicted under the Acts for slandering her husband, Jefferson replied: "...I discharged every person under punishment or prosecution under the Sedition law, because I consider and now consider that law to be a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image; and that it was ... my duty to arrest its execution in every stage ... He stated that he saw pardoning offenders convicted under that law as ... an obligation of (his) oath to protect the Constitution, violated by an unauthorized act of Congress... (Jefferson to Abigail Adams, July 22, 1804, contained in *The Adams-Jefferson Letters, op. cit.*, pp. 275-276). Thus, given Jefferson's strong feelings about the Alien and Sedition Acts, his hiding his authorship of the Kentucky resolutions, and the fact that he had been fighting a losing battle since Washington's first administration against expanding federal power, it is reasonable to assume, Jefferson's patriotism and loyalty to the new Union notwithstanding, that the ultimate purpose of the Kentucky resolutions could have been the justification of a secession movement. This possibility was rendered moot by the expiration of the noxious laws and the elevation of Jefferson to the presidency in 1800.

The Virginia Resolutions, written by James Madison and passed by the Virginia legislature on December 24, 1798, initially adopted an conciliatory tone concerning the threat the spirit of the resolutions posed to the Union: "Resolved, that the General Assembly of Virginia doth unequivocally express a firm resolution to maintain the Constitution of the United States ... (and) that this Assembly most solemnly declares a warm attachment to the Union of the states ... "; however, having dispensed with these formalities, the resolutions quickly got down to business: "...the General Assembly doth ... appeal to the like dispositions in the other states, in confidence that they will concur with this Commonwealth in declaring ... that the (Alien and Sedition) acts ... are unconstitutional ... and the necessary and proper measures will be taken by each for cooperating with this state in maintaining unimpaired the ... liberties reserved to the states respectively, or to the people..." Madison is as silent as Jefferson as to what those "necessary and proper measures" might be.

Given Madison's philosophy on the doctrine of federal power, so eloquently expressed only a decade earlier in the Constitution Convention, it becomes clear that the Virginia and Kentucky Resolutions, while issued ostensibly as philosophical manifestoes regarding the nature of American government, were actually political broadsides aimed at the Federalist party then in power at the expense of the Republicans. While Jefferson's adherence to the precepts of limited government had a long history prior to the passage of these resolutions, Madison in the Constitutional Convention was one of the leading proponents of a strong national government at the expense of the states. Madison was even on record in the Federalist Papers concerning the proper course of action to take should the federal Congress adopt an unconstitutional law: "If it be asked what is to be the consequence in case the Congress shall misconstrue this part (the elastic clause) of the Constitution and exercise powers not warranted by its true meaning? ... In the first instance, the success of the usurpation will depend on the executive and judicial departments, which are to expound and give effect to the legislative acts; and, in the last resort, a remedy must

be obtained from the people, who can by the election of more faithful representatives annul the acts of the usurpers." Madison did see a place for the various state legislatures in this process: "The truth is, that this ultimate redress may be more confided in against unconstitutional acts of the federal than of the state legislatures, for this plain reason: that as every such act of the former will be an invasion of the rights of the latter, these will ever be ready to ... sound the alarm to the people and to exert their local influence in effecting a change of federal representatives." Thus, Madison is on record as proposing the following recourse to an unconstitutional act of Congress: an appeal to the federal executive for a veto of the law, followed by appeals to the federal judiciary which would raised the appropriate Constitutional objection. As a last resort, the people could remove their House representative at the following general election; the state legislature could replace the state's senators. The immediate role of the state legislature in this process would be to alert the people to the constitutional crisis and to exert influence in local politics to remove the guilty federal officeholder. In no case could the state legislature declare the federal law unconstitutional, null, or void. The ultimate recourse against unconstitutional acts, according to Madison writing in 1788, was the removal of the federal representatives who voted for the law, replacing them with those who would repeal it. As to the concept of state sovereignty *vis-a-vis* the federal government, the Madison of 1788 had this to say: "...(If the state constitutions were sovereign), the world would have seen for the first time a system of government founded upon an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of its parts; it would have seen a monster whose head was under the direction of its parts." (All quotes from Madison in this paragraph are from Federalist #44).

Thus, though it seems possible that Jefferson, given his political frustration at seeing the power of the federal government expand throughout the first ten years of the republic's existence and his philosophical adherence to a concept of limited federal power, might possibly have seen the Resolutions as the first step towards the resistance of federal encroachment on the rights of the states, it seems doubtful that James Madison, a strong nationalist who was a strong defender of the Constitution, could have harbored such sentiments. Thus, the true nature of the resolutions is a cause for debate. Were the resolutions seen as calls to state action by the arch-republican Jefferson when they were seen as nothing but political maneuvering by the politically crafty Madison? The mystery deepens when it is realized that the two men spent months plotting the course of action which eventually led to the introduction of the resolutions in Kentucky and Virginia. (See Rutland, Robert, *James Madison,* Macmillian Publishing Company, N.Y, N.Y., 1987, pp. 156-158 for a discussion of the political planning which went into the Resolutions.) Madison in 1799 wrote that the resolutions were "...expressions of opinion, unaccompanied with any other effect other than what they may produce on opinion by exciting reflection (Madison quoted in *Great Issues in American History, op. cit.,* p. 177). Jefferson (who kept his part in this affair secret for many years) was less calm about the danger he saw being posed to liberty by the acts of the federal government; he wrote to Elbridge Gerry on January 26, 1799: "I ... wish an inviolable preservation of our present federal Constitution according to the true sense in which it was adopted by the states ... I am opposed to the monarchising of its features ... with a view to conciliate a first transition to a president and senate for life ... and thus to worm out the elective principle..." (*The Life and Selected Writings of Thomas Jefferson, op. cit.,* pp. 544-545.) Jefferson, evidently, saw the struggle between his philosophy and that of the Federalists as something other than a mere political quarrel; the future of liberty in the United States was at stake. The federalists were merely taking the first step on a road that would lead to the destruction of liberty, replacing it with monarchial despotism. Seen in that light, perhaps it is easier to understand Jefferson taking a more

radical view of the situation than did Madison. Jefferson's biographer Dumas Malone interpreted the resolutions both as a statement of party. principle and a statement of political philosophy ("In attacking the (Alien and Sedition) acts as unconstitutional, he was undoubtedly voicing his own conviction, but he was also following the line that Republicans had taken in Congress." Malone, Dumas, *Jefferson and the Ordeal of Liberty,* Little, Brown, and Company, Boston, Mass., 1962, p. 402.)

Whether or not the Virginia and Kentucky resolutions were mere political manifestoes to aid the Republicans in the 1800 elections or whether they were the harbingers of a secession crisis to come is an interesting question. If they were mere political documents, as Madison probably viewed them, then had the Federalists succeeded in reelecting John Adams no Constitutional crisis or crisis of the Union would have occurred. If, on the other hand, they were the product of statesmen who were convinced that the political path chosen by the Federalists was one that would lead to the extinction of liberty in the new nation, then perhaps the two southern Republicans would have looked upon a reelected Adams as their southern brethren looked upon a newly-elected Lincoln sixty years later. At any rate, the Virginia and Kentucky resolutions served to remind the nation just how fragile the new Union was. Interestingly enough, the two men most responsible for them were to occupy the presidency for the next sixteen years.

3. This crisis was manifested in the Hartford Convention, which met in Hartford, Connecticut from December 15, 1814, to January 5, 1815. This Convention resulted from two things: 1) New England merchants' opposition to the war of 1812 and the devastating effect that war had on New England trade; and 2) Federalist frustration at the Virginia Dynasty, which had occupied the seat of the federal executive since 1800 (and would retain it until March of 1825). The final Convention report contained three parts: 1) the first part contained the enumeration of nine causes of the "uniform and rapid declension of the nation"; 2) the second part was a series of three resolves, the third of which contained proposed constitutional amendments; and, lastly 3) the third part consisted of seven proposed constitutional amendments.

If the Virginia and Kentucky Resolutions bore the stamp of political platforms hiding behind the guise of principled legislation, that stamp is even more indelibly affixed to the Hartford Convention. In the first section, there is not one reason given for the decline of the nation that in any way bears resemblance to a statement of constitutional principle; some examples include: "...a deliberate and extensive system ... to secure to popular leaders in one section of the Union the control of public affairs in perpetual succession ... "; "The political intolerance displayed ... in excluding from office men ... for want of adherence to the executive creed ... "; "The influence of patronage in the distribution of offices... "; "...a visionary and superficial theory in regard to commerce ... and a ruinous perseverance in efforts to render it an instrument of coercion and war." (All quotes from the Hartford Convention Report are from the Report, located in *Great Issues in American History, op. cit.,* pp. 237-242.) This section does no more than list some New England Federalists' political grievances against the party in power, the Republicans.

The resolutions, offered "...to strengthen, and if possible, perpetuate, the union of the states," proposed only two narrow points concerning defense policy of the New England region and seven constitutional amendments. The constitutional amendments were designed to weaken the influence of the southern states on federal policy by such constitutional changes as not counting slaves for purposes of representation and not allowing the president to stand for reelection. In addition, one proposed amendment would place a constitutional prohibition on electing a president from the same state as the preceding one. The amendments also sounded strangely like Calhoun's theory of concurrent

majority, as they moved to ensure New England would retain a voice in the operation of the federal government disproportionate to her size. These provisions included making a 2/3 voter of both Houses of Congress necessary for a declaration of war and the admission of a new state to the Union.

Thus, the Hartford Convention, lacking the brilliance of a Madison or Jefferson and degenerating into not much more than a party convention, and coming at the successful end to the War of 1812, did not really pose a serious secession crisis to the Union. One author has characterized the Convention as such: "New England Federalists called the meeting to let off steam, (to) look for a solution to their defense problems, and to (serve as a) vehicle for airing their long-term grievances." (Hickey, Donald R., *The War of 1812, The Forgotten Conflict*, University of Illinois Press, Chicago, Ill., 1989, p. 280.) However, the Hartford Convention did serve a purpose: it reminded all Americans that questions of federal/state sovereignty were potentially explosive. It was a lesson not lost on Andrew Jackson. While most national leaders seemed to have shrugged off the effects of the conference, Jackson stated that, had he been stationed in New England at the time, he would have court-martialed and hanged the "monarchists and traitors." (*The War of 1812, op. cit.*, p. 279.) As the future would prove, the Tennessee slaveholder's disdain was not confined only to "traitors" located north of the Mason-Dixon line.

4. Montesquieu's concept that the viability of a democracy as a function of its size is from "The Spirit of the Laws," contained in *Great Political Thinkers, op. cit.*, p. 434.

5. Madison's refutation of this theory that a democratic government cannot effectively govern a large country was deemed so important to the federalists who were proposing the ratification of the new Constitution in 1787-1788 that the writers of the Federalist Papers devoted two entire essays to the issue. In Federalist #10, published November 22, 1787, Madison developed his theory of "extending the sphere" to ensure that factions which spring up in the nation do not rend the government asunder. The conventional wisdom, espoused by Montesquieu and seized upon by the anti-federalists in their attack on the stronger centralized government, was that a democracy, subject to majority rule, could not guarantee that a numerical majority would not, through sheer force of numbers, exercise a tyrannical rule over any minority factions that might spring up. Madison, in Federalist #10, completely reversed this type of logic: "Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for those who feel it to discover their own strength, and to act in unison with each other." Madison, who was well capable of strong logical, constitutional arguments, was also a politician; as such, he was well aware of the political workings of a government. This was shown by his next argument that an extension of the sphere would be a guarantor of individual liberties: "...it may be remarked, that where there is a consciousness of unjust or dishonorable purposes, communication is always checked by mistrust, in proportion to the number whose concurrence is necessary." Thus, for constitutional and practical reasons, Madison argued that the nation could be governed effectively by a democracy.

Madison obviously felt that his argument of November 22 had not sufficiently allayed the fears of those who still clung to the Montesquien dictum, so eight days later, on November 30, a second essay on the extended republic was published. In this essay, Madison took a new track; instead of constitutional reasoning, he appealed to the independent spirit of Americans to disregard the conventional wisdom of a dead past, and to embark on a new journey with a government whose concepts could find no roots in the

past: "Hearken not to the unnatural voice which tells you that the people of America, knit together as they are by so many chords of affection, can no longer live together as members of the same family ... Hearken not to the voice which petulantly tells you that the form of government recommended for your adoption is a novelty in the political world ... no, my countrymen, shut your ears against this unhallowed language. Shut your hearts against the poison it conveys ... if novelties are to be shunned, ... the most rash of all attempts is that of rending us apart to preserve our liberties ... why is the experiment of an extended republic to be rejected merely because it may comprise what is new? Is not the glory of the people of America that, whilst they have paid a descent regard to the opinions of former times ... they have not suffered a blind veneration for antiquity ... To this manly spirit, posterity will be indebted for ... (its) private rights and public happiness." In such a manner, by appeals to reason and the American spirit, the Montesquien objection to a large democracy was answered by James Madison.

6. Though, of course, the Virginia and Kentucky resolution controversy did have a sectional tint, as all three states to which Jefferson and Madison turned to offer their resolutions (North Carolina, Virginia, and Kentucky) were below the Mason-Dixon line.

7. The political nature of the Hartford Convention is covered in note 3. However, even though this was mainly a political crisis, the sectional character of the convention (all the delegates being from New England) cannot be ignored. However, with the demise of the Federalist party and the loss of the political principles which it carried to its grave, the issues raised by the Convention were transitory. This was also not, however, the last time that New England threatened and carried out organized opposition to federal law (see Craven, Avery O., *The Rise of Southern Nationalism*, Louisiana State University Press, 1953, for an account of New England reaction to the Fugitive Slave Law of 1850).

8. This can be seen from the fact that the two protagonists in the Nullification Crisis of 1828-1832 were both born in South Carolina (though Andrew Jackson claimed Tennessee as his home state), and that they were both Democrats (indeed, for the first crisis in 1828, Calhoun was Jackson's vice-president!). Therefore, the issue was slowly shifting from an interparty contest to a contest of South vs. Union. Though the political parties were by no means dead after the Nullification Crisis, this episode was a gloomy harbinger of a future where there did not exist a political form in which to settle sectional differences by time-proven political compromise.

9. This assertion, that the passing of Jefferson and Adams would have given the leaders of a nullification movement pause, is discussed by George Forgie in an excellent book, *Patricide in the House Divided*, W.W. Norton and Company, 1979, pp. 51-52. In this book, the author states: "For the first time, Americans had to collectively face the phenomenon of passing time ... for, by this dazzling coincidence, the world of the Revolution seemed wretched away by a stroke..." The result of this collective realization of the passing of an age, a realization reinforced by the coincident deaths of two Revolutionary founders, Jefferson and Adams, contained, in Forgie's interpretation, "...a paradoxical double message. On one hand, the fathers are gone, and a new generation has succeeded them to power; on the other hand, the fathers are immortal and will always rule." Perhaps in this double message lies the key to understanding the Nullification Crisis: one side, inflamed by a strong filial love for the fathers, bent on saving the Union; the other side bent on throwing off the past, symbolized by the passing of Jefferson and Adams, and striking out in bold fashion on the initiative of a new generation. Couple these psychological undercurrents with the tariff

issue at hand, with the specter of slavery hovering in the minds of the South, and one can begin to understand the motivations of both the nullifiers and the Unionists.

10. See note #2 for an in-depth discussion of Madison, Jefferson, and the Resolutions.

11. The ostensible reason for the crisis was the tariff policies of the federal government. As early as 1816, with a Jeffersonian Republican in the White House and the Federalist Party all but dead as a result of its opposition to the War of 1812, the government had established a tariff whose rates were set as a protection for American industrial production. In 1824, with James Monroe in the White House, the tariff rates had been raised again. This economic shift to a system of protective tariff rates proved to be one of the more volatile issues of the 1820s. As John Adams wrote to Thomas Jefferson: "Congress is about to assemble, and the clouds look black and thick ... the encouragement of manufactures by protecting duties or absolute prohibitions ... will probably produce an effervescence..." (Adams to Jefferson, November 23, 1819, contained in the *Letters of Adams and Jefferson, op. cit.*) The main proponent of the high tariff rates, Senator Henry Clay of Kentucky, in a speech in the Senate on March 31, 1824, defended the economic theory behind the new duties: "...the most prominent circumstance which fixes our attention ... is the general distress which pervades the whole country ... what is the cause of this unhappy condition...? It is to be found in the fact that ... we have shaped our industry, our navigation, and our commerce in reference to a war in Europe and to foreign markets ... The greatest want of civilized society is a market for the sale and exchange of the surplus of the produce of the labors of its members ... this market may exist at home or abroad ... but with respect to (these markets') relative importance ... the home market is first in order and paramount in importance... We must speedily adopt a genuine American policy ... let us create a home market, ... let us withdraw the support we now give (foreign) industry, and stimulate that of our own country." (Henry Clay, "Speech on the Tariff," contained in *Great Issues in American History, op. cit.*, pp. 272-273) Thus, the leading spokesman for the system of protective tariffs laid out his argument that in order to promote and foster economic markets close to home, and to insulate the American economy from the influence of foreign markets, a protective tariff was necessary.

The agricultural section of the country, the South, felt that they were to bear the brunt of this new "American system." Clay moved quickly to reassure them: "Supposing the South to be actually incompetent, or disinclined to embark at all in the business of manufacturing, is not its interest, nevertheless, likely to be promoted by creating a new and an American source of supply for its consumption? If this bill should pass, an American competitor in the supply of the South would be raised up, and ultimately I cannot doubt that it will be supplied more cheaply and better .. " (See citation above, p. 273). However, Clay's perceived need to explain to the South that it would benefit from the bill only underlines the fact that he expected most of the opposition to arise from that part of the country. He was not wrong in that supposition; throughout the 1820s, the southerners burned with the indignation that the agricultural interests of the nation were being sacrificed to the industrial interests of the Northeast. (See Van Deusen, Glyndon, *The Jacksonian Era,* Harper and Row, New York, New York, 1959, p. 39 for a description of the Southern resentment for Clay's "American System.") This somewhat simplistic attitude provided a simple explanation for the economic downturn that struck the nation in the winter of 1828-1829; though the causes of that downturn were complex, and the effects nationwide (*The History of the Old South, op. cit.*, in the chapter entitles "Toward a More Diversified Economy," pp. 415-435, details the resentment southerners felt at being "economic colonies" of "Yankee financiers." While this chapter contains economic statistics

from 1800-1860, there is a specific section in the chapter dealing with the economic problems caused by the protective tariffs of the 1820s and 1830s.), the decade of conditioning that the southerners had received about the evils of the tariff made any rational explanation of the causes of the recession in 1828-1829 inconsequential. Thus, by 1828, the tariff was an emotional issue in the South; John C. Calhoun was ready to try to ride that issue to a new form of government which could protect the South.

12. The character and motivation of Calhoun are difficult to describe. One southern historian (Clement Eaton, in *The History of the Old South, op. cit.*) called Calhoun "...a complex person, not a cast-iron man ... but a flexible man who adjusted himself to the changing economic interests of the South..." Flexibility seemed to describe Calhoun perfectly; his political career was marked by a distinct shift in his outlook from a strong "War Hawk" nationalist when he first entered Congress in 1811 to the embittered sectionalist that marked his last term in the United States Senate, the office he held when he died. At any rate, the young Congressman who voted for a protective tariff and the second National Bank of the United States, the young Congressman who said of the Constitution: "(I am) no advocate for refined argument on the Constitution ... it ought to be construed with plain good sense..."; this man was completely different from the old senator who sat listening to his speech being read on the floor of the Senate: "I have, Senators, believed from the first that agitation of the subject of slavery would ... end in disunion." (The young Calhoun quoted in Eaton, p. 332; the elder Calhoun quoted in Craven, *The Growth of Southern Nationalism, op. cit.*, p. 82.)

Juxtaposed against this seeming philosophical shift which Calhoun underwent was a profound political disappointment; Calhoun wanted to be President of the United States. What had cost him his prize was a personal feud with the president under whom he served as vice-president in the late 1820s, Andrew Jackson. The causes of this feud appear to be so shallow and unimportant that it would seem they should be dismissed by historians in the search for the true reasons why Calhoun and Jackson had their failing out. These episodes, of course, were the "Peggy Eaton Affair" and the discovery by Jackson that then-Secretary of War Calhoun, in the cabinet of President James Monroe, had argued for censuring Jackson, then a general in the Army, for his conduct against the Indians in Florida. The rivalry in the Democratic party between the Van Buren wing and the Calhoun wing, which caused these differences between Jackson and Calhoun to be amplified totally out of proportion to their true value, was no doubt the reason these seemingly small conflicts would lead to such disastrous results for Calhoun; perhaps, as he looked back on these episodes and realized that they had cost him the presidency, their very insignificance served only to increase his bitterness. The question is, therefore, did these seemingly minor incidents produce an estrangement between the two southerners, or was the real reason that Calhoun and Jackson broke that Jackson chose the nationalistic path and Calhoun the sectionalist path during the Nullification Crisis? In other words, did the loss of the presidency cause Calhoun to take his sectionalist stance, or did Calhoun's sectionalist sentiment cause his break with Jackson and thus the lost of his most coveted prize? The final answer to this question will never be known; it followed Calhoun to his grave on March 31, 1850.

13. Calhoun, John C., "Fort Hill Address," contained in Hofstadter, Richard (ed.), *Great Issues in American History, op. cit.*, p. 279.

14. *Ibid.*, p. 279.

15. The two quotes listed here are from the "Fort Hill Address," *op. cit.*, pp. 281-282.

16. In the introduction to Calhoun, John C., *A Disquisition on Government,* (edited by C. Gordon Post and published by the Liberal Arts Press, New York, New York, 1953), the editor speculates on the possibility that Calhoun's training in college and in the law, occuring as it did in the North, nevertheless exposed him to the secessionist sentiments of his two arch-fedaralist professors, Judge Tapping Reave and James Gould.

17. *Ibid.*, p. 282.

18. See note 11 for a brief sketch of the tariff problem which ostensibly led to the nullification crisis. In the autumn of 1830, following the passage of the Tariff of 1828, South Carolina first attempted to take state action to nullify a federal law. However, the proposal to call a convention to discuss nullification failed. By the passage of the Tariff of 1832, which continued the high rates begun in 1828, the people of South Carolina were finally moved to action; the state legislature passed a resolution calling for the meeting of a convention; this convention did meet, and, on November 24, 1832, voted to declare both the Tariff of 1828 and the Tariff of 1832 "null and void." The nullification ordinance was to go into effect on February 1, 1833, after which date no federal duties could be collected in South Carolina and no appeal from the courts of South Carolina to the Supreme Court concerning the tariff would be allowed.

South Carolina was expecting her sister states to rally to the cause of nullification; none did, with the exception of Georgia, which only went as far as recommending the calling of a southern convention. The publication of the Fort Hill Letter, mentioned in this chapter, marked the first tim that Calhoun's name was officially linked to the nullifiers; in the midst of the crisis, he resigned the vice-presidency and returned to South Carolina, whose legislature immediately sent him to the Senate.

The reaction of President Andrew Jackson was swift and sure. Publicly and officially, on December 10, 1832, the president issued "A Proclamation to the People of South Carolina," drafted by Edward Livingston, his Secretary of State: "I consider, then, the power to annul a law of the United States, assumed by one state, incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, reauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed." ("A Proclamation to the People of South Carolina," located in *Great Issues in American History, op. cit.*, p. 284. Privately and unofficially, the president vented his rage by threatening to lead personally an army against the state of South Carolina and to hang the nullifiers from the nearest tree. (Eaton, *A History of the Old South, op. cit.*, p. 336.)

The crisis, from this climax, proceeded on to a peaceful denouement. Offering a carrot in one hand and a stick in the other, Congress, on March 1, 1833, passed a revised tariff law more acceptable to the South and a Force Bill, which authorized the president to use the army to collect custom duties in South Carolina. In response to the carrot, South Carolina then repealed her nullification ordinance; in response to the stick, she nullified the Force Bill. The importance of this episode, its own constitutional crisis notwithstanding, was demonstrated in 1860, when some southern leaders, remembering that South Carolina had been abandoned in her hour of need by her sister states, demanded that the South proceed to secession in a unified manner. Interestingly enough, South Carolina again in 1860 disdained this "cooperationist" road, and boldly struck out on her own on the 20th of December, 1860. (The history of the nullification crisis, summarized by this note, was taken

from Eaton, *op. cit.*, pp. 334-338. For more on the "cooperationists" of 1860, see Craven, Avery O., *The Growth of Southern Nationalism, op. cit.*, chapter entitled "Secession 1860.11."

19. "Disquisition on Government," *op. cit.*, p. 3.

20. *Ibid.*, p. 4.

21. This explanation of Calhoun's philosophy is drawn from the introduction to Calhoun's disquisition, written by the editor C. Gordon Post, p. 20.

22. "Disquisition on Government," p. 3.

23. *Ibid.*, p. 5. This rejection of the "social contract" and the rejection of the concept of residual rights of life and liberty transferring from the state of nature to the social state also goes a long way towards legitimizing slavery in that it specifically rejects such corollaries as: "All men are created equal," and "They are endowed by their creator with certain inalienable rights."

24. *Ibid.*, p. 7.

25. *Ibid.*, pp. 7-8.

26. *Ibid.*, pp. 12-13.

27. *Ibid.*, p. 13.

28. *Ibid.*, p. 14. Calhoun was well aware of the tendency of sectional interests to form coalitions; he had dedicated a large part of his political life trying to develop an alliance between South and West. One of the most bitter disappointments of a career marked by disappointment was the slow dawning on Calhoun that the grand political alliance between West and South for which he had labored would never come to be; the increased reliance of the West upon the federal government for internal improvements and protection, the growing West-North economic cooperation, and the West's desire for the new territories to be free-soil doomed any hope of South-West cooperation.

29. *Ibid.*, p. 19.

30. *Ibid.*, p. 20.

31. *Ibid.*, p. 26.

32. *Ibid.*, p. 27. This thinking of a concurrent majority was not exactly new. As early as the Constitutional Convention of 1787, as the delegates were struggling with the problem of applying political theory to the concrete problems of American politics, the concept of a plural executive, drawn from different parts of the Union, was discussed. (Madison, *Notes, op. cit.*, pp. 46-48.) Even arch-republicans such as Thomas Jefferson, writing in his autobiography, speaking from personal experience in the Continental Congress, recognized the futility of a plural executive.

33. Calhoun, John C., "A Discourse on the Constitution," contained in Post, Gordon C., (ed.), *Disquisition on Government, op. cit.*, p. 86.

34. *Ibid.*, p. 97.

35. *Ibid.*, p. 98.

36. See Madison, *Notes, op. cit.*, pp. 46-48, for the debates in the Constitutional Convention concerning the plural executive. This concept of a plural executive, coming as it did from the Constitutional Convention, is another example of the main weakness of Calhoun's argument: the attempt to fashion eighteenth century remedies for nineteenth century problems.

37. "Discourse on the Constitution," *op. cit.*, p. 104.

38. *Ibid.*, p. 104.

39. This quote was taken from Abraham Lincoln's First Inaugural Address, located in Basler, Roy, (ed.), *The Collected Works of Abraham Lincoln*, Volume IV, Rutgers University Press, New Brunswick, NJ, 1953, p. 264.

VIII. THE CONSTITUTIONAL ADJUDICATION OF A CRISIS WHICH LACKED A MORAL DIMENSION--THE FEDERALIST/REPUBLICAN CLASH 1790-1800

A. INTRODUCTION

The true measure of a government's stability is its ability to weather political crises. As covered earlier in the previous section, there was widespread fear among the framers of the Constitution that political faction in the new republic would spring up and strangle the infant democracy of America in its cradle. Indeed, delegates at the Convention itself had been presented with one of the new nation's first secession crises, as a delegate from Delaware, Gunning Bedford, threatened that his state would seek foreign alliances outside the federal Union if the federal Congress was apportioned based on population alone, with no regard for the equality of state suffrage. On July 2, 1787, delegate Luther Martin of Maryland stated that "no modifications whatever" to a plan for apportionment by population alone "could reconcile the smaller states to the least diminution of their equal sovereignty," and the delegate who followed Martin to the floor that day, Roger Sherman of Connecticut, lamented that, over the question of state sovereignty, the Convention had come to "a full stop."[1]

Therefore, the predilection of democratic representative systems to become torn by faction was no new concept for American political leaders; those who had participated in the Convention itself had seen first-hand that destructive tendency of institutions designed to represent a broad spectrum of interests to fragment into antagonistic factions. The true test of the new government formed in Philadelphia was going to be its ability to withstand the forces inherent in a large democracy that were already acting to break asunder the tenuous bonds which held the new Union together.

No one at the federal convention of 1787 recognized this concept more clearly than did the nationalistic Virginian, James Madison.[2] The committee had been engaged in debate for only nine days when Madison rose to address the Convention on June 6, 1787. He here advanced the argument which would later emerge as the classic Madisonian theory of "sphere extension" so intricately expounded upon the Federalist #10. It is important to realize in what context Madison was making this floor speech; it was in response to Roger Sherman of Connecticut, who had listed what he thought were to be the objects of the new Union: "...1) defense against foreign danger; 2) (defense) against internal disputes and resorts to force; 3) treaties with foreign nations; (and) 4) regulating foreign commerce..."[3] Madison objected to this narrow rendition of the objects of a Union. In his reply, he stated what he though should be the objects of the government about to be created: "...the necessity of providing more effectually for the security of private rights, and for the steady dispensation of justice." What is more interesting, however, is the chief danger Madison saw opposed to these ends of government: "All civilized societies are divided into different sects, factions, and interests ... in all cases where a majority are united by a common interest or passion, the rights of the minority are in danger ... In a republican government, the majority if united always have an opportunity ... it is incumbent upon us then to frame a republican system ... in such a form as will control all the evils we have experienced (with faction)."[4] Of all the dangers surrounding this new experiment in republican government foreseen by this astute political philosopher within two weeks of the opening of the Constitutional Convention the danger of faction stood out as the one most threatening to the stability of the new nation's government.

It will be the purpose of this chapter to examine an instance in early American history where acrimonious political factions did spring up aver a policy issue; this process of examination will be undertaken in the context of discussing how the American process of Constitutional adjudication was able to withstand a very severe political challenge within its Constitutional framework. This process will be undertaken with an eye towards using the secession theory advanced in the introduction of this thesis as a backdrop; that theory advanced as a hypothesis

that the moral dimension of slavery raised the issue to a plane above which the Constitutional framework was powerless to effect a compromise. The purpose of this chapter will be to reinforce that theory by showing that there did exist before the slavery crisis another crisis no less momentous, no less acrimonious than the one occasioned by the slavery debate. The successful resolution of this crisis will show that the United States government did possess the required stability early in its history to deal with factionalized crises; and, indeed, it was the moral dimension of the slavery question, not a structural inadequacy in U.S. Constitutional government, which rendered the issue particularly unsuited to constitutional adjudication.

The crisis chosen to indicate the points mentioned above should have two important characteristics; it should be broad enough encompass an important issue; it should be a fundamental issue on which learned men could disagree honestly, yet over which disagreement could cause a serious perceived threat to the foundation of the government. Equally important, it must be, for the purposes of this chapter, a "morally neutral" issue; one over which the debate could be exclusively and entirely restricted to the Constitutional realm. A crisis which meets these basic criteria was the crisis which gave rise to the first political parties: The Federalist and the Republican controversy concerning the question as to whether or not the Constitution was narrowly written document to be construed by a strict reading of its provisions; or a document painted with a broad brush which sketched only the bare framework of a national government, a framework whose interstices were to be filled in as various needs arose. This was indeed the fundamental issue facing the first generations of American political leaders; the gravity of the situation was clear to the participants; and the major participants felt that the very liberty and justice guaranteed by republican government was at stake.

The crisis mentioned above as the example to be used in this chapter has, in addition to the fundamental characteristics described in the above paragraph, two additional characteristics which well recommend it to this part of the study. First, the crisis occurred in the early years of the republic. The passions kindled by the debate over Constitutional ratification were still high;

presumably, the anti-federalists still smarted from their recent defeat,[5] and the opportunity presented to an opposition party to sabotage the new government before the "mystic chords of memory"[6] of the nation's founding could fast bind its separate parts together was as great now as it ever would be in the future. Therefore, the government's ability to withstand factional discord while still in nascent form augured well its ability to withstand them in the future. Secondly, this crisis is well recommended for this study since it pitted Thomas Jefferson, the political mentor of James Madison, the very man who had warned of the danger of faction, against Madison's erstwhile philosophical ally Alexander Hamilton. This characteristic leads to easier analysis because both Hamilton and Jefferson were prolific writers, and their papers contain an excellent synopsis of the political battle fought over this controversy.

B. METHODOLOGY USED FOR THIS CHAPTER

The political crisis engendered by this debate was as far-reaching as it was profound; therefore, for the purposes of this study, it would be impossible to present a complete historical picture of the struggle. Therefore, the following methodological considerations will be used in this chapter to make a useful examination of the topic. First, the crisis will be framed by the writings of the two major participants mentioned above. This necessarily excludes such influences on the debate as future Chief Justice John Marshall of the United States Supreme Court or John Adams, the second President of the United States. For a historical treatise, this would be inexcusable; however, for the purposes of this thesis, in the context of discussing the secession theory, this historical shortcoming can be forgiven. The issues were framed decisively by these two principles, and an examination of their writings can adequately convey the depth of feeling that most major participants in this debate experienced. Secondly, in addition to the restriction of the spatial domain described above, the temporal domain must also be restricted. Indeed, it can be argued correctly that this question has dogged the United States government to this very day; it can be said with some degree of historical accuracy that this debate is still open. However, for the

purposes of this study, the political disagreement between the Federalists and the Republicans will be encapsulated by the clash between Hamilton on one hand and Jefferson on the other regarding the constitutional interpretation of the National Bank Act passed by Congress in 1791. This is a good episode to focus on in that it lent itself exclusively to questions of constitutionality, legality, and efficacy, and was, therefore, devoid of any moral considerations. In addition, the bank controversy presents an account of the Republican/Federalist conflict that is almost entirely devoid of the vicious personal Attacks that attended the administration of John Adams as the Federalists and Republicans engaged in editorial warfare. These types of personal attacks lowered the level of the constitutional debate; therefore, an examination of the Bank issue presents the controversy in as non-partisan a way as can be found during this period. As proof of the seriousness of this question to the existence of the Union, the election of 1800 will be examined to examine the depth of the partisan feeling generated by a decade-long struggle between Federalists and Republicans over the true nature of the federal government. It will be the assumption of this chapter that the election of 1800, with its extremely high stakes, was the end of the crisis from a factional viewpoint, and, therefore, that election presents a convenient event at which one can stop and assess the peak seriousness of the political crisis. Thus, the temporal domain of this chapter will be limited to 1791 (the year of Hamilton's clash with Jefferson) and 1800-1801 (the years of Jefferson's election and elevation to the presidency).[7] The limiting of the analysis to an examination of the opinions of the principles concerning the Bank measure in no way captures the partisan and bitter political struggle which engaged the Federalists and the Republicans during the last decade of the eighteenth century. It does, however, demonstrate the convictions of two important party leaders at the beginning of the Federalist/Republican controversy; this demonstration of principles, and the demonstration that the conflict was contained within the political system, is all that is required in this chapter. For it is at this point of "political system containment" where the slavery issue, due to moral considerations as examined in the next chapter, rendered the existing political system unfit for Constitutional

adjudication. Even with all the methodological disclaimers inserted above, it is important to realize that the political struggle over the Bank was in actuality over an issue more fundamental than merely the chartering of a federal corporation. Jefferson harbored a deep mistrust of the new government; he feared that it had incorporated provisions that tended toward monarchy; a situation which, after his tenure in Europe, he found intolerable. Taking advantage of these centralizing tendencies in the new government, Jefferson felt, were a class of men who were never really reconciled with the Constitutional Convention's rejection of the English system of government. It was the motives of these men, in his never-ending watch to prevent the encroachment of this monarchial spirit, that Jefferson feared the most. On May 23, 1792, Jefferson penned a letter to President Washington in which he set forth these fears: "...the public mind is no longer confident and serene ... capital employed in paper speculation ... has furnished effectual means of corrupting such a portion of the legislature as turns the balance between the honest voters whichever way it is directed ... this corrupt squadron (of legislators) ... (has) manifested (its) disposition to get rid of the limitations imposed by the Constitution on the general legislature ... the ultimate object of all this is to prepare the way for a change from the present republican form of government to that of a monarchy, of which the English Constitution is to be the model." Jefferson saw the scheme to charter a bank as put a step on the road to ultimate tyranny: a monarchial system of government. In seeing this conspiracy, then, (just as Lincoln some seventy years later would conceive of a movement of slavery into the territories as but the first step in a conspiracy to enslave the entire country under the tyrannical reign of a despot), Jefferson was apt to be very suspicious of any act which tended to expand the power of the federal government; it is easy to see, therefore, why this struggle took on such a heated partisan flavor, and why Jefferson would come to see his elevation to the presidency, not as mere party victory, but, in actuality, as the salvation of the liberty which his generation had fought so hard to obtain for America. When viewed from this context, the following discussion of the Bank Bill controversy pales in comparison to the actual issue as Jefferson saw it: the preservation of American liberty

over tyranny. Hamilton, on the other hand, who had made no secret of his preference for the British system in the secret debate of the Constitution Convention, never reconciled himself to the fact that republican democracy was the best form of government that the Convention could have devised. In a letter to Timothy Pickering, dated September 16, 1803, shortly before his death, be tried to defend himself against the charge that he was a secret monarchist. He stated untruthfully that he had "...never proposed either a president or senate for life"; Madison's notes show him doing just that on the eighteenth of June during the Convention. His defense of his republican credentials is lame, and he concludes with the observation: "...if I sinned against republicanism (in the Convention), Mr. Madison was not less guilty." He further stated that "...it was ... right and proper that the republican theory should have a fair and full trial..."; however, he was unwilling to admit that his first sentiments had been completely incorrect: "I sincerely hope," he wrote, "that it may not hereafter be discovered ... (that) the experiment of Republican government ... has not been as complete, as satisfactory, and as decisive as could be wished." From these sentiments, it appears that Hamilton was the perfect counterpoise for Jefferson during Washington's administration. While Jefferson was busy searching for motives that hid a secret desire for monarchy, Hamilton's plan for the country, though probably not encompassing an actual monarch, incorporated a vision that certainly was more aristocratic and less democratic than Jefferson thought safe. Thus, as we begin the analysis of the Bank crisis, keeping in mind that it would be impossible to portray the entire factional dispute as it was played out in the 1790s, it is important to see the Bank issue in this expanded context in order to understand the crucial nature of the conflict between Hamilton and Jefferson.[8]

C. THOMAS JEFFERSON'S OPINION ON THE CONSTITUTIONALITY OF THE BANK BILL--1791

On February 14, 1791, the Act for establishing a national bank passed the Congress and was presented to President George Washington for his signature. Washington was concerned about

the measure's constitutionality; therefore, he requested opinions from his attorney-general (Edmund Randolph of Virginia) and his Secretaries of State and Treasury (Thomas Jefferson and Alexander Hamilton, respectively). Randolph saw the measure as unconstitutional; so did his fellow Virginian, Thomas Jefferson.

Jefferson's response to the bank centered on both constitutional objections and questions concerning its usefulness. First and foremost were the Constitutional arguments. Jefferson left no doubt as to where he stood on the question; Washington did not have to read to the end of Jefferson's opinion to find out what his Secretary of State was recommending. In the first paragraph of his answer, Jefferson gives an unequivocal declaration: "I consider the Constitution as laid on this ground: that all powers not delegated to the U(nited) S(tates) by the Constitution, not prohibited by it to the states, are reserved to the states or to the people ... To take a single step beyond the boundaries thus specifically drawn around the powers of Congress is to take possession of a boundless f(ie)ld of power, no longer susceptible of any definition ... the incorporation of a bank ... (has) not, in my opinion, been delegated to the United States by the Constitution."[9]

Jefferson' answer then proceeded to address the specific constitutional objections. First he examined the "powers specifically enumerated" by the Constitution to Congress: "First, a power to lay taxes for the purpose of paying the debts of the United States." Jefferson did not see the bank as falling under the auspices of this section: "...no debt is paid by this bill, nor any tax laid..." In addition, he stated that if the bill were designed to raise revenues, the fact that it originated in the Senate "would condemn it by the Constitution." The second specific power, the power "to borrow money," was then examined. "...this bill neither borrows money, nor ensures the borrowing it." To make his point, Jefferson was forced to make a narrow distinction: "The operation proposed in this bill, first to lend (the bank proprietors) two million (dollars), and then borrow (it) back again, cannot change the nature of the latter act, which will still be a payment, and not a loan, call it by what name you please." A third, and last, specific power, the power "to

regulate commerce with foreign nations, and among the states, and with the Indian tribes," was analyzed. Jefferson dismissed this analysis with both a definitional objection and an objection based on the federal principle:

> To erect a bank, and to regulate commerce, are two different acts ... Accordingly, the bill does not propose the measure as a regulation of trade, but as productive of considerable advantage to trade ... Besides, if this were an exercise in the regulation of commerce, it would be void, as extending as much to the internal commerce of every state, as to its external. For the power given to Congress by the Constitution does not extend to the internal regulation of commerce of a state ... which remains exclusively with its own legislature ...

Thus, by Jefferson's analysis, the constitutional justification for the Bank cannot be found in any of the federal government's "specifically enumerated powers."[10]

Jefferson's arguments in this first section of his opinion, relating as they did to the specifically enumerated powers of the federal government, and relying as they did on perhaps too narrowly drawn definitions of commerce and borrowing, stood on fairly secure constitutional ground. However, as he turned from these specifically mentioned powers to what he called the "general phrases" of the Constitution, his argument revealed his true motivation for opposing the Bank: his ardent desire to keep the federal government as strictly limited as possible. It was obvious that he saw the Bank as only the first in a multitude of falling dominoes whose final effect would be the over extension of federal power at the expense of liberty. In his discussion of the first "general phrase," the power to lay and collect taxes for the general welfare of the United States, Jefferson first launched into a hair-splitting explanation of the required connection between the power to lay taxes and the purpose for which that power could be exercised. "For the laying of taxes is the power and the general welfare the purpose for which the power is to be exercised. They (the Congress) are not to lay taxes *ad libitum* for any purpose they please, but only to pay the debts and provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose."[11] Jefferson then explained what uncoupling the two phrases "to lay taxes" and "provide for the general

welfare" would do; it would give Congress a roving commission to exercise unlimited powers unchecked by any restrictions emanating from a written Constitution: "To consider the latter phrase (the general welfare phrase), not describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole (Constitution) to a single phrase, that of instituting a Congress with power to do whatever "would be for the good of the United States, and as they would be the sole judges of good or evil, it would also be a power to do whatever they pleased."[12] Jefferson thus saw the issue as one which was not simply limited to the chartering of a Bank; the controversy over the Constitutionality of the Bank had far-reaching implications regarding tyranny and the extinction of Jefferson's ideals of liberty.

In the second, and last, "general phrase" examined by Jefferson, the so-called elastic clause, Jefferson made clear that he did not think the elastic should be stretched very far. He argued for a strict, narrow definition of the word "necessary": "...the Constitution allows only the means which are necessary, not those which are merely convenient for effecting the enumerated powers." He then warned against the "domino effect" of such an interpretation: "If such a latitude of construction be allowed to this phrase... it will go to every one, for (there) is no one which ingenuity may not torture into a convenience, in some way or other, to *some one* of so long a list of enumerated powers." Jefferson then sought to present this argument as a matter of states rights: "Can it be thought that the Constitution intended that for a shade or two of *convenience* ... Congress should be authorized to break down the most ancient and fundamental laws of the states ...? Nothing but a necessity invincible by any other means can justify such a prostration of laws which constitute the pillars of our jurisprudence." Again and again, Jefferson returned to the same basic theme: Congress must be restrained by the *written words* of the Constitution as protection for the liberties of the people. This unlimited grant of power to the federal Congress

will be but the first step in a process resulting in the erosion of the boundaries of Congressional authority, which will then spill over into areas thought to be immune from its jurisdiction. This argument takes on added force when it is realized that the Bill of Rights, providing specific restrictions on actions by the federal government, was still ten months away from ratification (the first ten amendments were ratified on December 15, 1791); it had long been a tenant of federalist faith the a Bill of Rights was not necessary, as the states were to be the guardians of their citizens, civil liberties.[13] Given Jefferson's known objection to the lack of a Bill of Rights in the Constitution[14], and given his rejection of the contention posed by the federalists that one was not needed[15], there can be no doubt that his fear of an encroachment of federal power on the states took on a more immediate concern than it would have viewed in light of the past two centuries' development of American constitutional jurisprudence.

Jefferson's closing two paragraphs are puzzling. He spoke here of the power of the president to veto legislation. In the context of these remarks, it must be remembered that the concept of judicial review was over a decade away; Jefferson sought to persuade washington that the bill was unconstitutional and ought to be vetoed: "The negative of the President is the shield provided by the Constitution to protect against the invasions of the legislature the rights of the executive, of the judiciary, and of the states and state legislatures. The present case is the case of a right remaining exclusively with the states and is consequently one of those intended by the Constitution to be placed under his protection."[16]

Jefferson must have been troubled at his strong urging of a presidential veto. In his letters to friends after he had received a copy of the newly-ratified Constitution while he was stationed in France, Jefferson consistently listed two main objections to the new Constitution: the first, as mentioned above, was the lack of a Bill of Rights. The second one was the potential strength of the new executive.[17] In this office he saw the true threat to liberty; he was loathe, therefore, to urge Washington to veto the Bank bill lest he seem too eager to augment the powers of the office he saw as portending a greater threat to liberty than did the legislative. He therefore took pains

to make it clear to Washington that his power to veto legislation was not to be used liberally; it should be used sparingly, not as a power that should be brought to bear to influence legislation, but only as a redress against blatantly unconstitutional actions of the legislature. Thus, Jefferson's last paragraph sought to convey that sentiment to the president. In doing so, his argument lost some of its force: "It must be added, however, that unless the President's mind on a view of everything which is urged against this bill is tolerably clear that it is reauthorized by the Constitution, if the pro and con hang so even as to balance his judgement, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion. It is chiefly for cases where they are misled by error, ambition, or interest that the Constitution has placed a check in the negative of the President."[18] For Jefferson, who was not at the Constitutional Convention, to lecture Washington, who was, on the true purpose of the presidential negative bordered on the presumptions.

Jefferson's opinion and that of his fellow Virginian Edmund Randolph were placed before the President; on February 23, Hamilton, having read Jefferson's opinion, replied. Again, Washington did not have to read far to find out where his Secretary of the Treasury stood; in the first paragraph, Hamilton laid out the "...reasons which have induced him to entertain a different opinion."[19]

D. ALEXANDER HAMILTON'S OPINION ON THE CONSTITUTIONALITY OF THE BANK BILL–1791

Hamilton's defense of the Bank Bill against Jefferson presents an excellent example of the solving of a divisive political issue through the Constitutional system. The debate between Hamilton and the Republicans was characterized, at least in its nascent stages, by Constitutional argument; as one author has stated: "What appeared to (the republicans) as unconstitutional was for Hamilton a different view of what Constitutionalism required."[20] In other words, the argument put forth by Hamilton parallels Jefferson's in that the argument was kept on the Constitutional

plane, and questions of abstract morality did not enter into the discussion. Although in the latter part of the decade the debate descended into the realm of vicious *ad hominem* attacks, it never ascended onto a moral plane, where the adjudication process could prove itself inadequate. At any rate, turning now to an analysis of Hamilton's response, an important clue as to Washington's intentions presents itself. The circumstances of the timing of the opinions of Jefferson and Hamilton (i.e., the fact that Washington first obtained Jefferson's objections to the bill and then presented these objections to Hamilton for an answer) indicate that Washington had made up his mind to sign the Bank Bill and was looking for Hamilton to supply the intellectual argument in favor of the Bank's constitutionality.[21]

Hamilton lost no time in raising the stakes of the argument: "...(my) chief solicitude arises from a firm persuasion, that the principles of construction like those espoused by the Secretary of State ... would be fatal to the just and indispensable authority of the United States."[22] Thus, the Bank issue is no longer simply a narrow question of the advisability of having a national bank, nor is the constitutional decision of the conflict a narrow, legalistic determination of the meaning of the various taxing and commerce clauses of the Constitution; rather, the debate is to be centered on the fundamental nature of the government under the new Constitution. Jefferson, though he touched on the danger of "loose construction" in his report to the president, did so almost parenthetically, preferring instead to limit the bulk of his opinion to a narrowly legalistic focus. Hamilton eschewed this approach; he language is sweeping and broad; it talks of principles of government, and it draws no fine distinctions between definitions: "Now it appears to (me), that this *general principle* is *inherent* in the very definition of government and essential to every step of the progress to be made by that of the United States; namely--that every power vested in a government is in its nature *sovereign*, and includes by *force* of the *term*, a right to employ all means requisite, and fairly *applicable* to the attainment of the ends of such power; and which are not precluded by restrictions and exceptions specified in the Constitution; or not immoral, or not

contrary to the essential ends of political society."[23] The language of this opinion is not unlike the language of Chief Justice John Marshall, who would write later of the national government's powers in such sweeping language.

In any system which employs a form of common law in its legal jurisprudence, and in any governmental structure that relies on precedents from the past to justify opinions of the present, there is a natural hesitancy to shy away from such sweeping pronouncements as offered by Hamilton in this opinion. The consensus seems to be that, as every controversy matures, the principles who are to decide that controversy should approach the final solution in a rather circumspect way, encircling the problem with narrow, specific solutions rather than assaulting the problem frontally with a single approach. This leads to a slow maturation process in which the time taken to resolve a political or legal question is directly proportional to that particular problems import. Narrowness was the tone of Jefferson's opinion; had Hamilton likewise restricted his opinion to the more narrow issue (such as: did the Constitution allow the federal government to set up corporations?), then perhaps the political question which Hamilton was begging could have been put off for further reflection. However, as the tone of the opinion became more broad, Hamilton was inviting a more hasty solution; thus, this question, a question of extreme importance, was, in effect, answered by the end of the decade in which Hamilton wrote his opinion.

Hamilton attacked Jefferson's reasoning that the elastic clause should be interpreted narrowly:

> The degree to which a measure is necessary can never be a test of the legal right to adopt it. The relation between the measure and the end ... must be the criterion of constitutionality, not the more or less of necessity and utility ... the restrictive interpretation of the word "necessary" is also contrary to this sound maxim of construction; namely, that the powers contained in a constitution of government ... ought to be construed liberally in advancement of the public good.[24]

Hamilton was a powerful, effective writer. Whereas Jefferson's opinion, befitting its narrow focus,,was short and to the legal point, Hamilton's expansive prose wandered far and wide as he,

with a clear, logical argument, sought to demolish Jefferson's position. His opinion was a successful economic, political, and legal attack on Jefferson's argument; it is no wonder that Washington, as mentioned earlier, was prone to lean on Hamilton when he needed a legal or political foundation upon which to answer a political or legal charge. At one point in his opinion, Hamilton declined even to answer of Jefferson's objections since "...all of his (Jefferson's) observations are grounded on (an) erroneous idea ..."[25] In sum, Hamilton's argument was profound, extensive, and, as subsequent events would show when Washington signed the Bank Bill, effective.

For the purposes of the thesis, it must be remarked that, as effective and devastating as Hamilton's argument was, it never strayed above the Constitutional plane. It was a sweeping argument, to be sure; but an argument firmly rooted in Constitutional rhetoric. There was no allusion to any abstract "rightness or wrongness" in Hamilton's (or for that matter, Jefferson's) opinion. Thus both men, though arguing a divisive question from both a broad and narrow focus, kept that focus on Constitutionality, not morality. It was this focus which allowed the peaceful resolution of the crisis. For the opinions on the Bank Bill were but the opening rounds of a battle that was to drag on for the rest of the decade, as Jefferson grew ever more convinced that the Federalists were scheming to introduce monarchy into the United States.

E. THE SERIOUSNESS OF THE FEDERALIST/REPUBLICAN CLASH IN THE CONTEXT OF THE SECESSION THEORY

The rest of this chapter will be devoted to showing that the Federalist/Republican controversy was a controversy serious enough to warrant its inclusion in this thesis as an example of the ability of the American governmental system to adjudicate a potentially divisive political crisis short of secession. One of the first casualties of the political conflict was the alliance between Hamilton and Madison. Within three months of the clash on the constitutionality of the Bank, Hamilton was writing to Edward Carrington about a plot to undermine him in Congress; the

ringleader of that plot, alleged Hamilton, was none other than his erstwhile constitutional ally, James Madison: It was not until the last session (of Congress) that I became ... convinced of the following truth - That Mr. Madison ... is at the head of a faction decidedly hostile to me and my administration, and actuated by views in my judgement subversive to the principles of good government and dangerous to the union, peace, and happiness of the country." Hamilton moved to assure his reader that his feud with Madison was not personal; higher principles were involved: "These strong expressions (against Madison) ... (are) the result of a serious alarm in my mind for the public welfare." Madison was not the only republican viewed with mistrust by Hamilton; nor was domestic politics the only area in which Hamilton saw potential disaster in their policies: "In respect to our foreign politics the views of these gentlemen (Madison and Thomas Jefferson) are ... equally unsound and dangerous. They have a womanish attachment to France and a womanish resentment against Great Britain. They would draw us into the closest embrace of the former and involve us in all the consequences of their politics ... various circumstances prove to me that if these gentlemen were left to pursue their mm course there would be in less than six months an open war between the United States and Great Britain."[26] This last sentence encapsulates Hamilton's fears of following Jefferson and Madison's political creed. To one of the leading nationalists at the Constitutional Convention, a man who viewed the chaos of government under the Articles of Confederation with disgust and horror, the events of the French Revolution, with its attendant bloodshed and mob anarchy, was anathema. The thought of following domestic and foreign policies which had even a remote possibility of bringing a similar pestilence upon the shores of the United States must have repulsed him. In a certain respect, Hamilton's fear that Jefferson did not view the carnage of the French Revolution with as deep a disgust as he did was, to some degree, borne out by a letter in which Jefferson wrote of the utility of revolution. To Abigail Adams on February 22, 1787: "The spirit of resistance to government is so valuable... I wish it to be always kept alive ... I like a little rebellion now and then ... "[27] To William Short on

January 3, 1793, Jefferson defended the regicide and execution of innocent people that the French Revolution had occasioned:

> (The Jacobins) tried the experiment of retaining their hereditary executive. The experiment failed completely, and would have brought on the reestablishment of despotism bad it been pursued ... the expunging of that officer was of absolute necessity ... In the struggle which was necessary, many guilty persons fell without the form of a trial, and with them same of the innocent ... I deplore (the execution of innocent people) as I should have done had they fallen in battle ... was ever such a prize won with so little innocent blood?[28]

It certainly appears odd that Jefferson, the man who was so adamant about the inclusion of a Bill of Rights into the United States Constitution that he counseled states to withhold ratification until one was obtained, would so flippantly sanction the execution of innocent people. Certainly this attitude partially vindicated Hamilton's fear that Jefferson might be willing to loose similar forces into the American political scene should he deem the 1790s one of those times he would countenance "a little rebellion."

If the specter of anarchy and bloodshed was always looming in the federalists' perceptions of the nation's future under republicanism, the republicans had a similar apprehension about the logical conclusion of Federalism: the fear of monarchy. Late in his life, Jefferson wrote his autobiography; in one revealing passage, he described his arrival in America from France to take up the office of Secretary of State: "Politics was the chief topic (at dinner), and a preference of kingly, over republican, government was evidently the favorite sentiment ... I found myself ... the only advocate on the republican side of the question." Jefferson then left no doubt as to who was to blame for this sorry state of affairs: "Hamilton's financial plan had then pas(sed the Congress). It had two objects: 1st as a puzzle, to exclude popular understanding and inquiry; 2nd, as a machine for the corruption of the legislature ... with grief and shame it must be acknowledged that his machine was no without effect ..." Jefferson then explained the true meaning of the Bank Bill:

> A division ... had taken place in the honest part of that body (the House of Representatives) between the parties styled republican and federal. The latter, being monarchist, adhered to Hamilton ... so that the whole action of the legislature was now under the direction of the treasury. Still the machine was not complete. The effect of (Hamilton's monetary policies)

> would be temporary ... some engine of influence must be contrived, while these (legislators under Hamilton's sway) were yet in place to carry it through all opposition. This engine was the Bank of the United States.

The motive for the Bank was not purely economic; there was a sinister hidden motive involved: "By this combination (the members of Congress and stockholders who acted as Bank directors), legislative expositions were given to the Constitution, and all the administrative laws were shaped on the model of England, and so passed." Jefferson saw in this model in general, and in Hamilton in particular, the true threat to American liberty: "... Hamilton was not only a monarchist, but for a monarchy based on corruption."[29] Again and again, Jefferson returned to this theme: the policies of the federalists were paving the road to monarchy.

There are many more examples of the depth of feelings generated between Hamilton and Jefferson over this question. However, for the purposes of this thesis, those already mentioned above will suffice. These examples show that the political controversy generated by this federalist/republican clash, personified by the personal clash between Hamilton and Jefferson, ran more deeply than simple questions of economic policy. Thus, it can now be stated that this was a political crisis that rose above the more mundane political questions of the day to present fundamental constitutional questions. The clash would not end with the retirement of Jefferson and Hamilton from the cabinet; it would proceed through the decade of the 1790s, and it would not end until the election of Thomas Jefferson as the third president by the U.S. House of Representatives in February of 1801.[30] Having covered the philosophical and constitutional framework of the debate in the above chapter, the historical denouement of the crisis is covered in the notes. It is sufficient to note here that the political crisis personified by the clash between Jefferson and Hamilton was solved within the existing political framework by the American electorate, without recourse to secession.

F. CONCLUSION

What lessons, then, are to be gleaned from this episode in relation to the theory of secession put forth by this thesis. The foundation and the framework of the United States government are set up to contain the divisive elements of political faction and to funnel the energy generated by the clash of those factions into useful, good law. Political factions clash daily in our system of government, and for a vast majority of the political battles fought, this system of government has ensured a an easy, painless means of problem resolution. However, throughout the history of the republic, there have been rare occasions in which the political crisis engendered by the clash of factions has been precipitated by issues of such vast importance as to not allow for so peaceful a resolution as usually occurs. The true test of the stability of a government is found in its ability to weather these types of crises. The crisis described above was one such crisis in which constitutional adjudication worked.

This crisis should be viewed with an eye towards determining the demarcation line between it and the controversy generated by the slavery question a generation later. Did the slavery controversy pose a more important question than the one described above? Hamilton and Jefferson would have answered "no"; especially to Jefferson, the crisis described above was of monumental importance, for the future of liberty in America was at stake. Were the statesmen of the generation which dealt with the slavery question any less able than the generation of the founders? Perhaps they were, but certainly Henry Clay, Daniel Webster, John Calhoun, and Abraham Lincoln, to name but a few, were the political equals of Alexander Hamilton, James Madison, Thomas Jefferson, and John Adams. In addition, the evidence is clear that the founders were unable to deal with the slavery issue in any decisive way; they recognized the degree to which debate on slavery raised political/sectional passions, and, even towards the end of their lives when they were removed from the political fray and could more calmly and effectively provide leadership on this serious question, they failed to do so.[31] The demarcation line must lie elsewhere. It is the point of this thesis that, in the context of the secession theory, it was the moral

element of the slavery question which kept tugging the debate out of the constitutional adjudication process which had solved the Federalist/Republican controversy into the area of abstract questions of "rightness" and "wrongness." This chapter, as stated before, is intended only to offer an example of a divisive political issue handled by the American political system due to the fact that any elements of abstract morality were, for the most part, excluded from the debate. The next chapter will explore this unique moral quality of the slavery debate in the context of the secession theory. By the early 1840s, the first and the third elements of the secession theory already existed in the United States: Hostile factions had been formed over the slavery question, and the heat of the debate was directed by political leaders of state institutions which, having been weaned on the philosophy of John C. Calhoun, possessed both the infrastructure and the means to effect secession. However, the second element of the theory was still missing; *viz.*, that certain element which would make the question unsuitable for constitutional adjudication. The Compromise of 1820 and sectional peace which followed appeared to indicate that factional discord engendered by the slavery controversy indeed could be so resolved. However, the question would not lie quiet, and, more ominously, the question that could not be answered was not: "Does the Fifth Amendment's due process clause apply to property held in slaves?" Rather, the question became: "Is it morally right, under a government so jealous about protecting the nation's liberty, to hold fellow human beings in bondage against their will?" A satisfactory legal answer could have been applied to the former question; indeed, one was supplied by Chief Justice Roger Taney in the Dred Scott decision. No satisfactory answer could be had to the latter question, and this moral dimension of the question removed the slavery debate from the realm of constitutional adjudication and slowly but surely guaranteed that it would be settled on the battlefield.

CHAPTER VIII ENDNOTES

1. Madison, James, *Notes on the Federal Convention, op. cit.*, p. 232.

2. A note here on the use of Madison and Hamilton as a political philosophers. There is a tendency to use Madison and Hamilton and their essays in the *Federalist* series as the *sine cnua non* of discerning the original intent of the framers regarding the nature of the new government and interpretation of the Constitution. This is the case because 1) both Madison and Hamilton wrote prolifically, and the Federalist essays do provide a wealth of well-reasoned analysis of the new government; and 2) Madison, as a delegate to the Convention, devoted a great deal of time and effort to this type of political philosophizing. Therefore, the discussion of the "extension of the sphere" remarked upon here and in an earlier chapter, derived as it was from the Federalist Papers, must be taken in the context of realizing that Madison and Hamilton were often in the minority in voting on the Convention floor; indeed, the latter was often a minority of one. Though Madison remained in Philadelphia for the entire Convention, Hamilton left soon after the Convention had convened, and, though he later returned to save New York the embarrassment of having no one there to sign the final Constitution, his input into the process of formulating the document was minimal. Thus, the Federalist Papers were written by a man with a decidedly nationalistic bent, Madison; a man who was so out of touch with even the moderate republican elements of the Convention that his plan of government was discarded without a vote, Hamilton; and a man who was not even at the Convention, John Jay. Therefore, the use of the Federalist Papers as the source document for Constitutional interpretation must always be limited by the above factors.

3. Madison, *Notes, op. cit.*, p. 74.

4. *Ibid.*, pp. 76-77.

5. See McDonald, Forrest, *E Pluribus Unum, op. cit.*, pp.365-367. This passage chronicles the attempts of anti-federalists in both New York and Virginia to obstruct the operation of the new government. In New York, the anti-federalist majority in the lower house of the state legislature, through obstructionist tactics, prevented either the election of presidential electors or the election of New York congressmen. In Virginia, the antifederalist Patrick Henry assured the appointment of two antifederalists as Virginia's two senators and then attempted (unsuccessfully) to gerrymander James Madison out of a seat in the federal House of Representatives. Fortunately, once Madison arrived in Congress, he was able to pre-empt the antifederalists' most salient issue: the absence of a Bill Of Rights. Madison introduced his proposals for amendments on May 25, 1791, in the House of Representatives, and, on the 24th of August, Madison's proposals emerged from the House in a series of seventeen amendments. The Senate version differed slightly, and, at the resultant conference Committee, the amendments were further consolidated into twelve separate articles. The first two were never ratified, but the latter ten became part of the Constitution on December 15, 1791. Thus, Madison, by his insight concerning the importance of the Bill of Rights issue to the antifederalists and his preemption of that issue, had removed the serious ammunition from the antifederalists' arsenal by the adjournment of the first

Congress. However, as these examples show, the antifederalists, having lost the ratification battle, were not loathe to attempt to sabotage the new government.

6. Basler, Roy P. (ed.), *The Collected Works of Abraham Lincoln, op. cit.*, volume 4, p. 271. This phrase quoted here is from Lincoln's first inaugural address.

7. While this chapter is not meant to be a historical rendition of the Bank Bill debate *per se*, it is important to realize here a theme which will be expanded upon later in the chapter; *viz.*, the Bank Bill debate was merely a vehicle for the expression of long-held political beliefs and fears of the two major participants: Thomas Jefferson (and the Republicans) and Alexander Hamilton (and the Federalists). These beliefs will be elaborated on later in the chapter, but they will be summarized here briefly. Jefferson feared the introduction of a hereditary monarchy into America; having returned from Paris as American minister to France, he had seen firsthand the suffocation of personal liberty by the French monarchy. His fear is shown clearly in a letter to the Marquis de Lafayette on June 16, 1782: "While you are exterminating the monster aristocracy and pulling out the teeth and fangs of its associate, monarchy, a contrary tendency is discovered in some here. A sect has shown itself among us, who declare they espoused our new Constitution, not as a good and sufficient thing itself, but only as a step to an English constitution." (Jefferson to Lafayette, contained in Peterson, Merril D., (ed.), *Jefferson, Autobiography ... Letters*, Literary Classics of America, Inc., New York, New York, 1984, p. 990.) Hamilton feared the "leveling" tendency of democracy and looked toward the British Constitution as the model upon which the future stability and strength of the new nation's government should be built. See Madison's *Notes, op. cit.*, pp. 129-139 for his speech in the Convention on the utility of adopting the British approach: "... progress of the public mind leads me to anticipate the time when others ... would join in the praise bestowed ... on the British Constitution, namely, that it is the only government in the world which unites public strength with individual security." Thus, the debate over the Bank Bill must be seen in its larger context to understand the full import of the debate and to understand its inclusion in this thesis as a crisis fully as profound and as acrimonious as the slavery controversy of the next generation.

8. Jefferson to Washington in Peterson (ed.), *op. cit.*, p. 985. Hamilton to Pickering in Frisch, Morton J., (ed.), *Selected Writings and Speeches of Alexander Hamilton*, American Enterprise Institute for Pubilc Policy Research, Washington, D.C., 1985, p. 513.

9. Boyd, Julian P., (ed.), *The Papers of Thomas Jefferson, Volume 19*, Princeton University Press, Princeton, N.J., 1974, p. 276.

10. *Ibid.*, pp. 276-277.

11. *Ibid.*, p. 277. Jefferson's argument here is not without historical justification. As the Constitution emerged from the Committee of Style, where it had been shaped by the nationalistic pen of Gouverneur Morris, the clause in question had read as follows: "They (congress) shall have the power to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defense and the general welfare of the United States." (*Notes, op. cit.*, p. 620.) The clause as written, separating the powers "to lay and collect taxes" and "to ... provide for the general welfare of the United States" by a semicolon, seemed to provide a blank check to the federal Congress to provide for the general welfare of the country. Roger Sherman of Connecticut called the delegates attention

to Morris' "trick," and the semicolon was replaced by a simple comma, thereby tying together the power to tax with the general welfare clause, and ensuring that the latter did not stand independent of the former. (McDonald, Forrest, *Novus Ordo Seclorum, op. cit.*, p.265.). In Jefferson's message to President Washington, the Secretary of State also misquoted the actual clause. The clause in its entirety reads as follows: "The Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and the general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;" (U.S. Constitution, Article 1, section 8). Given the style of this eighth section (that is, each power granted to Congress separated by a semicolon), Jefferson is technically correct that the tax clause and the general welfare clause were not meant to stand alone. John C. Calhoun was to seize upon this grammatical distinction when arguing that the protective tariff of 1828 was unconstitutional in that the taxing power could not be separated from the qualifying clause "To pay the debts of the United States"; in other words, taxes could be levied solely for revenue, and not for protection.

12. *Ibid.*, p. 277.

13. Madison's *Notes, op. cit.*, p. 630. Interestingly, as the final debate on the Constitution was taking place on September 11, 1787, Elbridge Gerry of Massachusetts, seconded by George Mason of Virginia, moved that a committee be formed to report out a Bill of Rights. This resolution was unanimously defeated; not a single state voted for it.

14. Jefferson was so perplexed that a Bill of Rights had not been appended that he formulated his own strategy of ratification to ensure that one was adopted. In a letter to Alexander Donald from Paris on February 7, 1788, he wrote: "I wish with all my soul, that the first nine conventions may accept the new constitution, because this will secure to us the good it contains ... but I equally wish that the four latest conventions ... may refuse to accede to it, till a declaration of rights be annexed." (Peterson, (ed.), *Jefferson, op. cit.*, p. 919.)

15. *Ibid.*, pp. 915-916. Jefferson to Madison, December 20, 1787: "To say ... that a Bill of Rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved, might do for the audience to whom it was addressed, but is surely a *gratis dictum*, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms." Jefferson presumably was referring here to the second clause of the Articles of Confederation, discussed at some length in an earlier chapter.

16. Boyd, (ed.), *op. cit.*, p. 280.

17. This fear of executive strength appeared in letters to William Smith (November 13, 1787) and James Madison (December 20, 1787), contained in Peterson (ed.), *op. cit.*, p. 911 and p. 916, respectively. Also, this fear was expressed in a letter to John Adams on November 13, 1787 (see Capon, Lester J., (ed.) *The Adams-Jefferson Letters, op. cit.*, p. 212).

18. Boyd, (ed.), *The Papers of Thomas Jefferson, op. cit.*, p. 280.

19. Frisch, (ed.), *Selected Writings and Speeches of Alexander Hamilton, op. cit.*, p. 248.

20. *Ibid.*, p. 3. This analysis is contained in the introduction by Professor Frisch.

21. Washington made it a point, at least one other time in his presidency, to turn to Hamilton for answers justifying certain policies of his administration, policies objections to which had been raised by Thomas Jefferson. In May of 1792, Jefferson sent to President Washington a list of objections concerning the administration's domestic policies. Washington wrote to Hamilton, enclosing a list of grievances which were almost verbatim copies of Jefferson's list of grievances. Washington did not disclose that they were Jefferson's grievances; he stated that they were gleaned from "others less friendly to the Government, and more disposed to arraign the conduct of its officers" that he had met on a recent trip to Mount Vernon. Washington's thinly veiled plea for help to Hamilton in supplying him with answers to the questions was worded thus: "... wishing to have before me explanations of as well as complaints on measures in which the public interest, harmony, and peace is so deeply concerned ... it is my request, and you would oblige me in furnishing me, with your ideas upon the discontents here enumerated ... Although I do not mean to hurry you .... as soon as you can make it convenient to yourself, it would ... be agreeable and very satisfactory to me." Washington's plea for an explanation of his own administration's policy is a clear example of the degree to which Washington relied on Hamilton for the intellectual justification of his administration's programs. Therefore, the timing of the opinions sent to Washington on the Bank Bill, with Jefferson delivering his to Washington first and Washington giving Hamilton Jefferson's opinion concurrent with his request for Hamilton's advice indicates that Washington might have made up his mind to sign the Bank Bill and was using Hamilton to provide the intellectual justification of his actions. (Quote from Washington's letter taken from Frisch, (ed.), *Selected Writings and Speeches of Alexander Hamilton, op. cit.*, pp. 335-339.)

22. Frisch, (ed.), *Selected Writings and Speeches of Alexander Hamilton, op. cit.*, pp. 248-275. This selection is Hamilton's opinion on the constitutionality of the Bank Bill.

23. *Ibid.*, pp. 248-275.

24. *Ibid.*, pp. 248-275.

25. *Ibid.*, pp. 248-275.

26. Hamilton to Carrington, May 26, 1792, contained in Frisch, (ed.), *op. cit.*, pp. 325-327.

27. Capon, Lester J. (ed.), *The Jefferson-Adams Letters, op. cit.*, p. 173.

28. Peterson, (ed.), Jefferson, *Autobiography ... Letters, op. cit.*, p. 1004.

29. These quotes from Thomas Jefferson are contained in his *Anas* (Notes) which he wrote as an appendage to his autobiography. The *Anas* are contained in a variety of sources; the one used here was the Library of America addition mentioned in the above footnote, pp. 666-671.

30. While this period was marked by the personal and political clash between Vice-President Jefferson and the Republican Party on one hand and President John Adams and the Federalist Party on the other over both foreign policy and domestic issues, the issue against which the tensions that existed between the two parties can best be examined is the

Sedition Act of July 14, 1798. Jefferson reaction to this act, and the subsequent publication of the Virginia and Kentucky Resolutions in response to it, are covered briefly in an earlier note (note 2, chapter five in section 1). This note, therefore, will be less concerned with these resolutions, the final result of the Republican outrage over this act, than with the legal argument mounted by the Republicans against the bill and the subsequent legal defense generated by the Federalist. For the purposes of this chapter, in which it has been stressed that the crises generated by these Federalist/Republican clashes during this decade (for example, the Bank Bill which was used here) were met by legal, not moral, argument, it is important to understand the legal nature of the argument between the two parties over this act. Even though in the Federalist case it can be argued with some certainty that their legal argument was intended to be a mere gloss over a blatantly partisan measure, it is important that a legal argument was made for the constitutionality of the Acts. Given that the act, measured against the strictures of the First Amendment, seems unconstitutional on its face, the legal argument of the Federalists is much more interesting than that of the Republicans; we shall, therefore, examine it first.

There is a tendency in the United States to believe that principles of Constitutional law against which the guarantees of liberty in the Bill of Rights are measured began their development with the elevation of Earl Warren as Chief Justice of the United States in the 1950s; therefore, the constitutionality of a law tends to be judged in the context of how the federal courts would view the law today. This pitfall must be avoided in this case for two reasons: 1) in 1798, the federal courts had not yet asserted their right to judicial review; and 2) there was a strong tradition in the English common law, the body of law from which the United States bad inherited a large body of its own jurisprudential philosophy, of punishment for seditious libel.

The Sedition Act specifically proscribed : "... writing, printing, uttering or publishing ... any false, scandalous, and malicious writings against the government of the United States, or against either House of the Congress of the United States, ... or to excite against them ... the hatred of the good people of the United States..." The act stipulated that its provisions were to expire two years after its enactment. (The quote of the act above, and the other quotes in this section, as well as the facts undergirding the discussion of the common law of libel below, are found in Kalven, Harry, *A Worthy Tradition–Freedom of Speech in America,* Harper and Row Publishers, New York, New York, 1988, pp. 60-73)

The Federalists argued that the common law crime of seditious libel remained outside the strictures of the First Amendment and, therefore, fell well within the jurisdiction of the federal judiciary. The Sedition Act was simply a codification of a general common law principle; freedom of the press, guaranteed by the First Amendment, was simply a prohibition on prior restraint (i.e., a restraint imposed prior to publication upon a publisher which forbids him to publish a certain document). The First Amendment, according to the Federalist argument, did not touch upon government action taken *after* publication. This interpretation of the meaning of "freedom of the press," taken with the absorption of the common law of seditious libel into American jurisprudence, gave ample legal justification for the Sedition Act.

The Federalists did not have a specious legal argument; their contentions concerning the meaning of "freedom of the press" were as valid as those of the Republicans. The fate of the doctrine of seditious libel in the United States seem to have borne out the federalists. That is, if the American system of adjudication is seen as a maturation process in which the fundamental rights guaranteed by the Constitution are distilled slowly and carefully through a case by case process, during which process the time for resolution is directly proportional to the importance of the fundamental right being discussed, the fact that the Supreme Court waited until 1964 to sweep seditious libel under the umbra of the first

amendment seems to indicate that in 1798 such speech indeed would have been removed from First Amendment protection. Other facts seem to indicate that seditious libel in 1798 would have been subject to sanction. In 1919, in *Abrams v. United States,* the Court had the opportunity to confront the doctrine of seditious libel, enshrined in the Espionage Act of 1917, which made it a felony to: "publish ... any disloyal ... scurrilous, or abusive language about the form of government of the United States ... (or) any language intended to bring the form of government of the United States into contempt, score, ... or disrepute." The defendants having been convicted simultaneously under other provisions of the act making the obstruction of the draft a crime, and the Court upholding the convictions on those counts, the issue of the constitutionality of the sections of the Act proscribing seditious libel was sidestepped by the Court; even Justice Oliver Wendel Holmes' dissent, usually powerful and eloquent in the defense of freedom of speech, refrains from declaring that laws against seditious libel are unconstitutional on their face, merely stating: "History seems against the notion (of the constitutionality of such statutes)." Thus, as late as 1919, a majority of the Supreme Court declined to declare seditious libel within the confines of the First Amendment. Even though the decisions of this period concerned prosecutions of seditious *acts* in time of *war,* the tenor of the decisions connotes a certain impatience with First Amendment claims in general. While the Court, in a plethora of cases stemming from the Espionage Act during this period, is involved in drawing elaborate distinctions between speech, incitement, and acts of treason in time of war, there is no eloquent statement of the fact that seditious libel in and of itself is unconstitutional. It was not until *New York Times v. Sullivan* in 1964 that the Court, with Justice Brennan authoring the majority opinion, turned to confront the constitutional issue of seditious libel. Brennan spoke of the historical reaction to the Sedition act: "These views (about the necessity for public debate concerning the government) reflect a broad consensus that the (Sedition) Act ... was inconsistent with the First Amendment." Thus, it has been the passage of time, and the historical condemnation of the Sedition Act, which has swept seditious libel to the hallowed place in First Amendment jurisprudence which it now enjoys. It can be said that Mr. Brennan was not as rigorous as he could have been in ferreting out instances after 1798 in which the principles of common law seditious libel were enshrined in the law, such as the instance mentioned here (the Espionage Act of 1917). The important point for this thesis is that it was the passage of time which showed the Court the light concerning the true nature of seditious libel; given that reasoning, it can be assumed with some degree of accuracy that the sedition act could possibly have been deemed Constitutional before a sufficient time had passed to generate sufficient criticism of its principles. In other words, the Federalists could have been correct when they claimed that the Act was constitutional in 1798; the jurisprudential history of the First Amendment was not developed to a sufficient degree to say definitively that the Federalists' interpretation was wrong. The passage of the Sedition Act is oftentimes portrayed as a historical curiosity, a mere blip on an otherwise spotless record of protection of free speech. It was nothing of the kind; it was simply one expression in a long history dating back to the English common law of the idea that it should be a crime against the state to criticize the state. Thus, the Federalists, though espousing an interpretation of the First Amendment seemingly at odds with the contemporary understanding of the freedoms that amendment guarantees, were, in 1798, standing on fairly firm constitutional ground with their assertion that the First Amendment could not be invoked as a defense against seditious libel.

Other precedents in American history, neglected by Justice Brennan in his opinion, illustrate the powerful effect that the theory of seditious libel can have on a nation dedicated to the ideals of a free press; no more powerful example can be found than the quasi-judicial case of the impeachment and trial before the Senate of President Andrew

Johnson. (Facts for this case are taken from Trefousse, Hans L., *Andrew Johnson-A Biography*, W.W. Norton and Company, New York, New York, 1989; and Smith, Page, *Trial By Fire*, McGraw-Hill, New York, New York, 1982, pp. 779-790.) Nestled among the eleven articles of impeachment lodged against Johnson by the House of Representatives was an article written as the result of Johnson's campaign speeches in the Congressional election of 1866; the article accused Johnson of libeling the Congress and bringing them into disrepute. Perhaps nō more ironic situation has ever presented itself in American political history. The President of the United States stood impeached by the House of Representatives for, among other things, seditious libel. This episode illustrates clearly the powerful hold the concept of seditious libel can have on the mind of the body-politic of a nation. One would be hard pressed to think of an example which demonstrated more clearly that the Congress of the United States did not consider seditious libel to be within the protection of the First Amendment; and this episode occurred in 1868, almost seven decades after the expiration of the Sedition Act of 1798.

The Republican argument was simply that the First Amendment was designed to protect seditious libel, and the act, therefore, was void on its face. The Republican argument, encapsulated in the Kentucky and Virginia resolutions, has already been explored earlier in the first section in the context of the doctrine of states-rights. Suffice it to say here that the argument was, as every argument was during the crises of this period, constitutional and legal, not moral. The Republican argument was both legal and procedural: 1) the acts were unconstitutional, and 2) the states were the proper legal forum in which redress could be obtained. As history was to show, the election of 1800 was the final redress, as the noxious law was allowed to expire, and President Jefferson pardoned all people convicted under the Act of 1798.

Thus, this controversy mirrored the Bank controversy in two important respects. First, it was a controversy that involved sharp, acrimonious exchanges over a public policy question; a question of sufficient importance to cause turmoil which could possibly have led to secession. Second, and equally important in the context of this thesis, the government survived because the minority view, the view of the Federalists, was defeated politically at the ballot box and intellectually by legal and constitutional arguments. The fact that the debate was kept on this plane, and never rose to the plane of abstract morality, kept the defeated party, as acrimonious and bitter as ever, in the Union to fight another day. There was a sense of finality about the settlement of the matter with the elevation of Jefferson to the presidency; this sense of finality was so desperately sought by the politicians who tried to manage the slavery question a generation later; yet it was never obtained. Jefferson's tone in his first inaugural address is me of a victor who has recently triumphed, not over a corrupt and dastardly foe bent m destruction of liberty, but over fast but misguided friends: "During the contest of opinion through which we have passed, the animation of discussions and of exertions has sometimes worn an aspect which might impose on strangers unused to think freely and to speak and write as they think; but this being now decided by the voice of the nation, announced according to the rules of the Constitution, all will, of course, arrange themselves under the reign of law, and unite in common efforts for the common good." This was American political adjudication at its finest; the question was kept morally neutral, and the battle waged in the political arena. As the next chapter will shaw, that arena could not contain the slavery issue similarly due to its moral dimension.

31. For example, Thomas Jefferson, after his retirement from public life, had ample opportunity to act on his professed abhorrence of slavery by putting his not inconsiderable influence in Virginia politics to work in backing an emancipation plan. He demurred; writing to

Virginian Edward Coles in 1814, fully twelve years before he died, Jefferson decreed that the abolition of slavery was a problem for the younger generation: "This enterprise (the abolition of slavery) is for the young; for those who can follow it up, and bear it through to its consummation." (quote from Jefferson located in Freehling, Alison G., *Drift Towards Dissolution--The Virginia Slavery Debate of 1831-1832*, Louisiana State University Press, Baton Rouge, Louisiana, 1982, p. 102.)

IX. ABRAHAM LINCOLN AND THE MORALITY OF SLAVERY

The purpose of the preceding chapter was to give an instance where the constitutional framework of the United States government was successful in adjudicating a critical political crisis which lacked any dimension of morality. The successful resolution of the Federalist/Republican clash in the early years of the republic highlights the advantage of what Madison called "the particular security of as written constitution": that is, the limitation of the debate on decisive issues to questions of constitutionality or unconstitutionality, not questions of abstract right or wrong. Thus, harking back to the original framework of this thesis, the secession theory consisting of three elements of which the second is the inability to solve a crisis within the given country's constitutional framework, it can be seen that in the preceding case, the second element was not met; specifically, if it is postulated that questions of abstract rightness or wrongness make a controversy particularly unsuitable for constitutional adjudication in the United States, then the fact that the government was able to defuse a crisis precipitated by a controversy lacking such a question as demonstrated in the preceding chapter argues well for the theory.

A. PURPOSE OF THIS CHAPTER AND METHODOLOGY USED

This chapter will attempt to explore the importance of the morality of the slavery question in driving the United States toward Civil War; in short, it will be the contention of this chapter that it was indeed this dimension of the slavery question which continually forced the resolution of the question outside of the Constitutional framework of the United States governmental adjudication process until no resolution was possible save the battlefield. In other words, the second element of the secession theory postulated in the introduction, the element which calls for a characteristic of the factional controversy which prevents the resolution of the controversy

within a given constitutional framework, is realized in the moral dimension of the slavery question.

This topic could be a thesis unto itself; its sheer breadth and depth requires the use of a methodology to study it that renders the topic manageable; yet, simultaneously, its importance to the validity of the secession theory mandates that a methodology be used which employs a more than cursory dissection of the underlying premises of this assertion. One approach would be to discuss the attempts at political compromise over the slavery question, from the Northwest Ordinance of the Confederation Congress to the Missouri Compromise of 1820; from the debate in the Virginia state legislature in 1831-1832 over the abolition of slavery in the Commonwealth of Virginia to the federal Compromise of 1850. The importance of these events in the discussion of the failure of the compromise mechanism of the United States governmental system cannot be overstated, and these events are covered in the notes.[1] Yet, the true understanding of importance of the moral dimension of the slavery question is not to be found in the study of these failed congressional attempts at compromise. A detailed study of these attempts would merely chronicle the failure of the constitutional mechanism to function; it would not explain why the failure occurred. This deeper understanding must lie elsewhere.

Similarly, an attempt could be made to answer the question of the importance of the moral dimension of the slavery question by a study of the federal judiciary's failed attempt to deal with the problem. The slavery controversy presents a unique example of pre-Civil War federal jurisprudence in that the Supreme Court actually attempted to supply an answer to the controversy; in these days of the post-Earl Warren federal judiciary, it is hard to imagine that the federal courts could not have been intimately involved in the slavery controversy of the day; at least after 1848, when the question before the Congress involved an interpretation of a Constitutional power of the federal government (*i.e.*, the right of the federal Congress to bar the importation of slaves into United States territories), the Supreme Court certainly could have found

a reason to exercise jurisdiction over the question. Its attempt to do so, and the consequences of that attempt, indeed indicate the inadequacy of the federal system to adjudicate this controversy; this also is covered in the notes[2]. But, again, this failure on the part of the judiciary to defuse the crisis tells only an incomplete part of this important story.

The methodology that will be the focus of this chapter, therefore, will eschew a detailed analysis of the failure of the political and judicial attempts at resolution made by the Congress and the federal courts in favor of a different approach. This approach will examine the mind of a certain individual as the notion of the immorality of slavery as the cause of the fratricidal conflict gradually grew therein; as the notion that slavery was a constitutional right to be protected in the southern states inexorably gave way to the conviction that the entire nation must experience a new birth of freedom to realize its full potential; as a conviction concerning the importance of a scrupulous regard of southern rights slowly gave way to the understanding that the resultant condoning of this national evil somehow bound the North to the South in moral responsibility for the vast carnage of the War; it is in this evolution of the thinking of the nation's sixteenth president, Abraham Lincoln, wherein lies a profound understanding of the importance, the absolute critical importance, of the centrality of the question of the morality of slavery in the precipitation of the southern secession movement of 1860-1865.

The selection of Lincoln as the case to study concerning this phenomenon has several factors to recommend it. First, and foremost, it was Lincoln as president who led the nation and made governmental policy during the latter part of the secession crisis and the entire Civil War; his understanding of the importance of the moral element of the slavery question, therefore, is central to the understanding of the importance of this dimension of the question. Secondly, Lincoln can be seen as representative of the vast majority of northern politicians who were moderate on the slavery question; Lincoln and the Republican party endured an unhappy partnership; for his entire political life, Lincoln was a Whig[3]; as such, he naturally gravitated toward the proposition that government should be limited[4]; and certainly the jurisdiction of the

federal government could not have been thought to extend into the states where slavery already existed. Furthermore, Lincoln was a lawyer; therefore, he would have been predisposed to be more sensitive to (and perhaps somewhat more receptive to) legal arguments than to moral arguments; not that Lincoln doubted the immorality of slavery, but he personified the psychological clash that can occur when one arrives at the conclusion that a certain phenomenon is simultaneously concretely legal and abstractly wrong. This disconnect between the moral and legal dimensions of the slavery controversy lies at the heart of the second element of the secession theory: the removal of the controversy from legal adjudication by the moral characteristic of the question; therefore, a study of how difficult it was for Lincoln to resolve this seeming conflict will do well to illustrate the divisive effect that slavery, with its contradictory moral and legal dimensions, had on the American body politic.

In order to trace Lincoln's thinking on the slavery question, three periods of his political life have be chosen as key indicators of the maturation process that his thinking underwent. The first period is marked by his first legislative forays into the political arena in attempts to legislate on the slavery issue. During this period, two pieces of legislation sponsored by Lincoln, the first in the Illinois House and the second in the federal House of Representatives, will be analyzed. An analysis of these two bills will demonstrate Lincoln's emphasis on the legal aspects, as opposed to the moral aspects, of the emancipation question. The second period studied, Lincoln's first term as president, will again focus on two documents: the First Inaugural Address and the Emancipation Proclamation. These documents will show a cautious Lincoln, a president whose main concern is preserving the Union and who views the slavery issue, if at all, as definitely subordinate to that main goal of preserving the government. Again, Lincoln retained the emphasis on the legal aspect of the problem; in his first inaugural address, he dwelt extensively on the limited powers of the president to act against slavery in the states where it already existed; in the Proclamation, he limited its effect to the states that were in rebellion against the Union, excluding from its jurisdiction the four loyal slave states. Though Lincoln, in his debates with Stephen

Douglas in 1858, showed himself to be extremely sensitive to the moral dimension of the slavery question, in his first term of office, possibly from a political motivation (*i.e.*, to keep from offending loyal southerners and conservative northerners), Lincoln chose to stress the legal constraints on his powers as president in dealing with the slavery question.[5] The third, and last, period to be discussed was the latter months of Lincoln's life, where, in a thorough repudiation of his earlier reasoning, he saw the North (and, as a consequence, himself) and the South sharing in the great moral trespass of slavery; the South for allowing it and the North for condoning it; and, as a natural corollary to this new attitude concerning the morality of slavery, Lincoln came to see the coming of the Civil War, in retrospect, as a consequence of this immoral association between the groups who were willing to countenance the moral evil of slavery. Thus, by the latter months of his life, Lincoln had come to believe the proposition that is at the heart of the second element of the secession theory postulated by this thesis: that the secession crisis of 1860 and the resultant Civil War was the result of the failure of the national government to deal successfully with the moral dimension of slavery; in other words, the legislative and legal compromises which were used to attempt to defuse the slavery controversy, those compromises which added a legal gloss to such an immoral institution and, in doing so, allowed slavery to flourish in the South, were the direct cause of the Civil War. However, the paradox inherent in such a belief is clear: what other path was available to the American government to deal with the crisis other than the Constitutional path which they indeed took in the years 1820-1860? If the legal path was inadequate to deal with the crisis, and the legal path was the only legitimate path sanctioned by the Constitution, then this speaks volumes on the inadequacy of our system of government in dealing with a moral question when the moral imperative and the legal solution are diametrically opposed.

B. THE FIRST LEGISLATIVE ATTEMPTS BY LINCOLN TO DEAL WITH SLAVERY (1839-1849)

There is a tentativeness and uncertainty which marked Lincoln's first two legislative forays into the area of slavery. The first such instance took place while Lincoln was a member of the Illinois General Assembly on January 5, 1839. Sometime previous to this date, two resolutions had been introduced into the Illinois House of Delegates regarding the apprehension and return of fugitive slaves captured in a free state; the first condemned the governor of Maine for refusing to return two captured fugitive slaves to Georgia; the second resolved that the legislatures of the free states should not interfere with the "domestic relations" of the slave states. Lincoln's response to these resolutions is interesting; the House journal recorded that he had initially considered voting for the resolutions, but, upon further reflections, he felt that a vote on the resolutions should be postponed. He made a motion to that effect, and the motion carried. Thus, in his first exposure to legislation dealing with an aspect of slavery, Lincoln took the safe political route; be called for postponing a vote. More remarkable than the eventual course he took (for Lincoln was, if nothing else, a careful politician) was his stated inclination to vote for the.resolutions before he decided he needed "...more time for deliberations."[6]

Lincoln's hesitancy to condemn slavery in the Illinois legislature was not matched by his willingness to express horror and indignation about the institution in his private correspondence. Though the subject was seldom mentioned during the early years of his service in the legislature, he did bring it up in a letter to a Mary Speed on September 7, 1841. In the middle of a light-hearted narrative concerning a trip he had taken with her brother, Lincoln suddenly changed his tone and related the following incident: "A gentleman had purchased twelve Negroes in different parts of Kentucky and was taking them to a farm in the South. They were chained six and six together ... so that the Negroes were strung together like so many fish upon a trot-line..." Yet, perhaps thinking of his own reluctance to publicly condemn a system which perpetrated such a monstrous injustice, and perhaps partly as a rationalization of his apparent willingness to avoid

controversy by postponing consideration of bills and resolutions involving the question of slavery, Lincoln related the observation that the Negroes did not seem to mind the fact they were being sold down river away from family forever: "...One, whose offence for which he had been sold was an over fondness for his wife, played the fiddle almost continuously; and the others danced, sung, and cracked jokes, and played various games with cards from day to day. How true ... that (God) renders the worst of human conditions tolerable..."[7] In this caricature of the happy, carefree slave, perhaps Lincoln sought to soothe his own troubled conscience, a conscience that, being a moral man, must have been upset by such a pathetic sight. How much more did his conscience trouble him that as a lawmaker he had been almost completely silent on this profound moral dimension of slavery?

Lincoln's next legislative brush with the slavery question occurred almost exactly a decade later, on January 10, 1849. Lincoln was then a member of the federal House of Representatives, and he rose on the above date to offer an amendment to a resolution that had been adopted by the House the previous month (December 21, 1848). That resolution, introduced by Representative Daniel Gott of New York, had instructed the Committee on the District of Columbia to prepare a bill to abolish slavery in the District. Lincoln's amendment, offered in the face of a motion made by Representative John Wentworth of Illinois to reconsider the above mentioned resolution, is highly illustrative of the care Lincoln felt compelled to take to endure the protection of property rights, even if the property rights about which he was concerned dealt with human chattels. This is perhaps best shown by the title which Lincoln gave to his amendment: "A Bill for an Act to Abolish Slavery in the District of Columbia, by the Consent of the Free White People of Said District, and with Compensation to Owners."[8] This bill is an excellent example of trying to use the existing Constitutional system to deal with the slavery question; as mentioned before, Lincoln was a very careful lawyer; he was a man who would naturally be as attentive to legitimate legal claims as he would to humanitarian motivations. This bill is carefully drawn and closely reasoned, and it was Lincoln's first attempt to deal directly with the slavery question within a Constitutional,

not moral, framework. As such, it is indicative of the fact that Lincoln, at this stage of his political career, though attuned to the moral injustice of slavery, still believed that it could be handled within a legal rubric. At the same time, it points out the limited utility that such an approach could be counted on to have. Legally, the Congress could exercise jurisdiction only in the District of Columbia; it had no constitutional or legal right to legislate on slavery in the states. Thus, though perhaps the scourge could be eliminated in the tiny District, it would remain untouched throughout the South. The limited effect of this bill, even if it had passed, underlines the growing difficulty the national government would have in the future in dealing with this problem which was growing increasingly national in scope.

Lincoln's effort in this case is a mixture of humanitarian concern and a scrupulous regard for the legal niceties of protecting property rights. This tendency is especially demonstrated in the second section of the bill. In this section, Lincoln provided that: "No person now within said district, or now owned by any person, or any persons resident within the same, nor hereafter born within it, shall ever be held in slavery without the limits of said district." This provision was probably inserted to stop the cruel practice of selling slaves from one jurisdiction into another just before the former jurisdiction's emancipation law went into effect.[9] Lincoln coupled this humanitarian provision with a provision, appearing in the same section of the bill, that provided that this clause was not to apply to the slaves that southern congressmen brought with them to the nation's capital. Here we have an example of the humanitarian attempting to eradicate an evil, confronted with the lawyer who always demands a compromise, a concession to property rights, which seems to dilute the moral force of the humanitarian. That these two impulses, one directed towards a humanitarian end and one directed toward a legal end, were embodied in the same person provides a remarkable example of the difficulty a system constructed upon the rule of law has in dealing with a moral concern. This difficulty, here personified in the person of Abraham Lincoln in 1849, would eventually lead the moral dimension of slavery to force the question outside the realm of constitutional adjudication, and lead, in conjunction with the growth of the

states rights faction in the South, to the secession crisis of 1860. This inability of the constitutional system to accommodate both the legal and the humanitarian approach to the question of slavery is reflected in this second section of Lincoln's emancipation bill.

This same bill contained further examples of the same phenomena; if anything, the tone of the bill is slanted heavily in favor of property rights. Section four of the bill ensured that owners of slaves currently held in the district would not be freed without adequate financial compensation from the U.S. Treasury. If no compensation was sought by the owner, then his unfortunate slaves would remain in bondage; they would remain slaves "...at the will of their respective owners, (the owners') heirs and legal representatives..." Section five a fugitive slave provision, was especially harsh; the return of fugitive slaves was to become a major issue in the next decade, and Lincoln's inclusion of this provision in this bill indicated that he was sensitive to the South's reasoning on this point. The wording of this section is important: "...the municipal authorities of Washington ... are empowered and required to provide active and efficient means to arrest, and deliver up to their owners, all fugitive slaves escaping into said district." The federal Fugitive Slave Law that would later be passed as part of the Compromise of 1850, the law that would arouse such righteous indignation in the North in the next decade, at least allowed the fugitive slave to have his side of the case heard by a federal commissioner to guard against the accidental apprehension and detention of a free black man accused of being a fugitive slave.[10] Lincoln's bill contained no such provision; theoretically, merely upon the word of a Virginia or Maryland slaveholder that the suspected black man was an escaped slave, he would be turned over to the owner. In this denial of even the crude due process allowed the accused black man in the future federal bill (even though in 1849 the concepts of "due process" and "slavery" were, in both theory and fact, mutually exclusive) Lincoln's bill can be said to be even more conservative that its future federal counterpart.

The last major section of the bill, the sixth, contained an odd feature: the submission of the bill, after its passage by Congress, to the "free, white male citizens over twenty-one" who resided

in the District. Contingent upon the affirmation of the principles of the bill by the electorate, the President was to issue a Proclamation declaring the provisions of the bill to be in force. Only after the people themselves voted on the question would any slave be freed under the provisions of the bill. This submission of the bill to the voters is curious. It is clearly not a legal requirement; the Constitution unequivocally gave the federal Congress legislative jurisdiction over the District. Passage of the bill by the Congress and signature by the President is all that would have been required; Lincoln, in attaching this section to the bill, seems to be acknowledging the inability of the Constitutional system to adjudicate this situation; clearly, it seems that Lincoln thought such a legislative action, though legal, would lack the force of legitimacy if it was not submitted to the voters. Thus, his impulse was to let the people decide the question for themselves. But if this extra democratic step in the process was required for an emancipation bill to gain legitimacy, then what did that say for the ability of the legal system to adjudicate the crisis that was just over the horizon. If the will of Congress could be thwarted by the actions of a majority in a certain political jurisdiction, then did this not amount to nullification? Lincoln's insertion of this section, therefore, speaks to a fundamentally held belief, a belief that would later facilitate the coming of the secession crisis: that the government as constituted was inadequate, for reasons of legitimacy or otherwise, fore the task of containing and resolving the moral dimension of the slavery question.

Lincoln's effort on this bill clearly illustrated the difficulty that could arise from a question that posed both legal and moral questions to the American constitutional framework. The slavery question was unique in that the shades of grey between the black and white moral choice were very faint indeed;[11] simultaneously, the legal status of slavery, insofar as the property aspect of the blacks was concerned, was settled law.[12] Thus, Lincoln was faced with a situation where the law required him to do one thing and his conscience required him to do another. In this, his first major attempt at dealing with this question, he tried to split the difference. This initial attempt to deal with the morality of slavery within a legal framework, as reflected by Lincoln's attempt here, was repeated by the U.S. Congress throughout the next decade. And, again reflected in the

future thinking of Lincoln, this legal approach would prove inadequate in dealing with the moral aspect of the slavery question. Within the space of a little more than a decade, this obscure one-term Congressman from Illinois would be elevated to the presidency; having been conditioned by the turmoil of the 1850s[13], and having had his positions sharpened and defined by a close loss for a seat in the U.S. Senate in 1858, Lincoln was poised once again to attempt to influence the slavery controversy. Now, however, he would not be speaking for a small Congressional district; his pronouncements would be the position of the national government. Let us now examine to what degree his views concerning the legal/moral conflict of the slavery controversy had changed in the intervening decade and, just as importantly, to what degree they remained unchanged.

C. LINCOLN AND THE MORAL/LEGAL DIMENSIONS OF SLAVERY (1860-1865)

It is difficult, indeed impossible, to generalize with exact precision as to the nature of Lincoln's views on this subject over his entire first term. Quotes taken out of context and strung together could be used to assert that Lincoln was either a cold-hearted realist with no understanding of the moral dimension of slavery or a bleeding heart abolitionist who wielded unconstitutional power in his dealing with the slave (and later freedmen) problems in the South. Neither of these extremes would be accurate; it would be incorrect to state that Lincoln had no understanding of (or sympathy with) the moral dimension of the problem; it would also be incorrect to say that Lincoln never compromised this moral understanding in his political dealings with the slavery question. However, if one looks at the record of the period taken as a whole, one can discern a basic theme: an increased sympathy with the moral dimension of the slavery question, but a general reticence to overstep legal bounds in his dealing with the question. That is, Lincoln, in his dealings with the slavery question, seemed to feel constrained by the need to justify his actions legally; a constraint, incidentally, which he seldom felt in his other exercises of extraordinary powers.[14] Thus, though Lincoln has come far since 1839 in his appreciation of the

moral context of the slavery question, he is still, for the most part, attempting to deal with the problem from a constitutional, legalistic vantage point. Again, however, as a president who was conscientious about following the law, what other path was open to him?[15]

The two documents presented here as evidence of the above mentioned constraints are, as mentioned earlier, Lincoln's first inaugural address and the Emancipation Proclamation. It is not purported that these two documents capture exactly the tone and tenor of all of Lincoln's statements on the slavery question during the Civil War; indeed, he was under tremendous political constraints in the preparation of both of these state papers that certainly colored the language used and the positions articulated.[16] Yet these two documents, political constraints aside, do reflect accurately the position to which Lincoln's understanding of the moral dimension of slavery had matured since his term in the House of Representatives.

D. LINCOLN'S FIRST INAUGURAL ADDRESS

Lincoln's first inaugural address was a philosophical and legal essay, much of it devoted, understandably, given the circumstances of the day, to the topic of the unconstitutionality of secession. Interestingly enough, however, the address begins with a reassuring pledge to southerners that their property is safe under the Constitution even with a Republican administration in Washington:

> Apprehension seems to exist among the people of the southern states, that by the accession of a Republican administration, their property, their peace, and their personal security are to be endangered. There has never been any reasonable cause for such apprehension. Indeed, the most ample evidence to the contrary has all the while existed ... in ... the published speeches of him who now addresses you ... I have no purpose, directly or indirectly, to interfere with the institution of slavery in the states where it now exists. I believe I have no lawful right to do so, and I have no inclination to do so.[17]

The last sentence of this quote is interesting; in it, Lincoln claims to have no interest in abolishing slavery in the southern states; this disinclination is presented in such a manner that it seems to stand independently from his assertion that he has no legal right to do so. In other words, even if he had the legal right to emancipate all the slaves in the nation, he would be disinclined from

doing so. This is not the statement of a man who sees the inherent moral deficiency of the South's peculiar institution. These are the words of a President willing to subordinate his moral inclinations in the area of slavery to a perceived greater goal: sectional harmony. The address continued that theme.

The next subject discussed is the volatile Fugitive Slave issue; Lincoln left no room for doubt where he stood on this legal/moral dilemma: "There is much controversy about the delivering up of fugitives from service or labor. The clause ... is as plainly written in the Constitution as any other of its provisions." The following paragraphs, in which Lincoln attempted to soften the harshness of that pronouncement by discussing reasonable due process considerations to ensure that no free black is unjustly impressed into slavery, do little to dispel the image of the president vowing to enforce the federal Fugitive Slave law against blacks who had escaped bondage to freedom.

The rest of Lincoln's address was given over to a legal discussion of the unconstitutionality of secession and patriotic appeals for the wayward southern brethren to return to the fold--with one exception. Immediately after a paragraph in which Lincoln sought to explain why the Dred Scott decision did not create binding precedent, Lincoln suddenly changed his tone, and a paragraph totally at odds with his legalistic approach, Lincoln turned, almost as an afterthought, to the moral dimension of slavery and its role in the crisis. This paragraph is especially revealing in that Lincoln wrestled publicly, albeit briefly, with the legal/moral dilemma of slavery. In it, after posing the conflict in moral terms, Lincoln asserted that the people would be willing, as he had proved himself willing, the subordinate the moral dimension to the legal. This passage is so central to the meaning of this section of this chapter that it bears repeating in its entirety:

> One section of our country believes slavery is *right*, and ought to be extended, while the other believes it is *wrong*, and ought not to be extended. *This is the only substantial dispute* (emphasis added). The fugitive slave clause of the Constitution, and the law for the suppression of the foreign slave trade, are each as well enforced, perhaps, as any law can ever be in a community where the moral sense of the people imperfectly supports[18] the law

itself. The great body of the people abide by the dry legal obligation in both cases, and a few break over in each. This, I think, cannot be perfectly cured.[19]

In this passage, Lincoln identified the moral/legal disconnect over the slavery issue as the "only substantial" issue over which the nation was dividing. He furthermore observed that the majority of the people were abiding by the "dry legal obligation" to act contrary to what their conscience, taking into account the moral dilemma posed by the situation, dictated.[20] The implication from this passage is clear: if the contending factions would just subordinate their moral concerns and execute the "dry obligations" called for by the law, then the "only substantial dispute" would be resolved and a secession crisis would be avoided. No other passage in any of Lincoln's speeches up to his inauguration put forward more clearly Lincoln's recognition of the legal/moral dilemma posed by the slavery question and his recognition of this dilemmas responsibility for the secession crisis. In addition, no passage puts forth with greater clarity Lincoln's inclination to defer to legal/constitutional mechanisms (the dry legal obligations) in dealing with the problem. That inclination was made in clearer in the next document under study: the Emancipation Proclamation.

E. THE EMANCIPATION PROCLAMATION

On July 22, 1962, Lincoln presented the first draft of the Emancipation Proclamation to the cabinet. It is obvious that Lincoln had taken great pains to appear to be acting within a legitimate legal sphere in taking the action. The Proclamation's first draft began: "In pursuance of the sixth section of the Act of Congress[21] ... approved July 17, 1862, ... I, Abraham Lincoln ... proclaim to and warn all persons within the contemplation of the said sixth section to cease participating in ... the rebellion ... on pain of the forfeitures and seizures, as within and by said sixth section provided." Lincoln clearly stated at the outset of this initial draft that he was acting under the authority of legislation approved by the Congress.

Yet, this legalistic track blunted the moral force that such a proclamation could have had; again, Lincoln showed himself still inclined to deal with the controversy brought about by the slavery question in legal terms.[22] The section of the act of Congress under which Lincoln was claiming authority provided that the property of the citizens of states who still persisted in the rebellion sixty days after the president issued a proclamation ordering them to cease and desist in doing so were liable to having their property confiscated by the federal government. This classification of slaves, not as human beings who are due their freedom as a natural right, but as mere property whose confiscation would damage the southern war effort is again legitimate evidence of Lincoln's inclination at this stage of his presidency to continue his subordination of the moral aspect of slavery to the legal constraints which he felt himself to be under.

In addition to the bias the initial draft of the Proclamation showed towards the property aspect of the slave, the moral force of the Proclamation was again blunted by its limited applicability. The Proclamation, conceived and delivered as a war measure, would limit is effect to slaves held in bondage in disloyal states; since the measure was designed to weaken the war effort of these rebellious states, there was no military necessity present which would require the freeing of slaves in loyal slave states. This limited applicability, more so than the framing of the Proclamation as a property confiscation measure, indelibly stamped the Proclamation as an amoral confiscation document. If Lincoln attempted to present the Proclamation as a property measure and then had proceeded to free all the slaves in the nation, it would have been clear that he would have been guilty of a legal inconsistency; but, nevertheless, an inconsistency whose ultimate result would have been a moral end. The fact that the operation of the Proclamation was consistent with its legal justification is indicative of one of two things: (a) either Lincoln prized consistency as a higher value than justice, or (b) the operation of the Proclamation was a reflection of his belief of the true nature of the measure. Lincoln's past inclinations toward dealing with the slavery question reviewed, they would lead one towards the latter interpretation. Lincoln reinforced this interpretation by including in the draft Proclamation a provision for compensation

of slaveowners who voluntarily manumitted his slaves, thereby reemphasizing the nature of slaves as merely property.

Lending even more weight to this interpretation of the Emancipation Proclamation as an amoral document was the nature of the discussion that followed Lincoln's presentation of the Proclamation to the cabinet. The Postmaster General, Montgomery Blair, was forcefully against the Proclamation's issuance, proclaiming that it would exact a high political cost from the Republicans the coming fall elections. Secretary of State William Seward approved of issuing the Proclamation, but only in the aftermath of a Union military victory. Secretary of the Treasury Salmon P. Chase gave the proclamation his "cordial support," but the Ohio abolitionist proposed to go even further; he wanted to arm the slaves in the South to fight for the Union. It is interesting that the issuing of the Proclamation was discussed exclusively from a political viewpoint; though it would be too much to expect that politics be excluded completely from the discussion, it would seem that, had the moral issue been in the forefront of the president's mind, this dimension of the Proclamation would have been discussed also.[23] The absence of any such consideration lends further credence to the assertion that the Proclamation was by its nature an amoral document, a confiscation measure and nothing more.[24]

On July 25, 1862, Lincoln issued the Proclamation called for in the Congressional Act mentioned above[25]; and on September 22, 1862, following the Battle of Sharpsburg, Lincoln issued the preliminary Emancipation Proclamation. The preliminary Proclamation began with the reaffirmation that the Civil War was being fought to restore the Union, not to free the slaves: "I, Abraham Lincoln, ... do hereby proclaim and declare that, hereafter as heretofore, the war will be prosecuted for the object of practically restoring the constitutional relation between the United States and each of the states, and the people thereof, in which states that relation is ... disturbed." The Proclamation then reiterated the proposal found in the initial draft for compensation of the states who voluntarily began a program of emancipation; however, in this preliminary Proclamation Lincoln introduced the concept of colonization which had been missing from his first

draft: "...and that the effort to colonize persons of African descent ... will be continued." The preliminary Proclamation then asserted that, on the first day of the new year 1863 that "...all persons held as slaves within any state, or designated part of a state, the people whereof shall then be in rebellion against the United States shall be then, henceforward, and forever free."[26] On January 1, 1863, Lincoln issued the final Proclamation, freeing the slaves in the states which were still in rebellion against the Union.[27]

Thus, though the end result of the Proclamation was noble, the process in which it was conceived, debated, and promulgated indicates clearly that Lincoln had not yet shed tendency to rely on the legalistic and constitutional rubric under which he bad labored throughout his political career in dealing with the question of slavery. His first inaugural address (especially with the passage on the perceived "rightness" and "wrongness" of slavery) demonstrated that indeed the dichotomy between the immorality and the legality of slavery presented a problem to him; he appeared willing to admit that the moral dimension of the question of slavery had a place in the public debate; but he seemed to be saying that if this initial moral inclination could somehow be subordinated to the "dry legal obligations" of the constitutional system, then the only true dispute between the two factions could be resolved and, with the slavery question defused by the governmental adjudication, the Union would be out of danger. This passage indicated that Lincoln now took the moral dimension of slavery seriously; yet, it also indicated that Lincoln believed the governmental system was able, if only the people would submit to the law instead of their conscience, to contain the crisis. This attitude was to undergo a dramatic shift in the next two years, as, a scant two years later, on March 4, 1865, Lincoln, in his second inaugural address, articulated an entirely new understanding of the relationship between legality, morality, slavery, and the coming of the Civil War.

F. LINCOLN'S SECOND INAUGURAL ADDRESS (MARCH 4, 1865)

Lincoln's second inaugural address as been adjudged by some historians to have been the most eloquent inaugural address ever given.[28] The last paragraph of that address, with its appeal to mercy and its call for a lasting peace throughout the nation, is perhaps the best known passage of the speech. Yet, it was in the preceding paragraphs wherein lies the true import of this speech; for in these paragraphs does Lincoln clearly relate his new understanding of the cause of the American secession crisis and resultant Civil War.

This new understanding bad its genesis as early as 1862, when, in a memorandum generated from Lincoln's meditation on the cause of the Civil War the president wrote: "God wills this contest, and wills that it shall not end ... (the contest) having begun, He could give the victory to either side any day. Yet the contest proceeds." Then, perhaps thinking of his own insistence on framing the contest in terms of union and disunion instead of slavery versus freedom, Lincoln began to understand that perhaps he was placing the emphasis on the wrong considerations: "God's purpose is something different from the purpose of either party."[29]

By the time of his second inaugural address, Lincoln was willing to go much further than this private philosophical musing about the true nature of the Civil War; most of the Address is given over to the development of this new theme: the moral responsibility of both the North and the South for the carnage and destruction wrought by the fratricidal conflict that was then only a few months from termination. Lincoln began by reviewing the importance of the slavery issue to the secession crisis of 1860-1861:

> One eighth of the whole population were colored slaves ... localized in the southern part of (the country). These slaves constituted a peculiar and powerful interest. All knew that this interest was, somehow, the cause of the war.

Again, in this statement, Lincoln returns to the theme which he began to articulate in his first Inaugural Address; yet, here it is not mentioned as somewhat of an afterthought, or mentioned only to introduce the concept that citizens, to preserve the Union, should subordinate any moral imperatives to the legal imperatives; here, the theme is reintroduced as an introduction to a

deeper understanding of the moral dimension of slavery, and how the country was so ill-served in the 1850s by the government's insistence on confining any resolution of the slavery issue to the political and legal arena; Lincoln then moved to explain that neither the initial war aims of the South (independence) nor war aims of the North (preservation of the Union) were the fundamental precepts from which the true meaning of the war is to be gleaned: "Neither (the North or the South) anticipated that the cause of the conflict might cease with, or even before, the conflict itself should cease. Each looked for an easier triumph, and a result less fundamental and astounding." In this passage, Lincoln has indicted the North (and, therefore, himself) for misunderstanding the secession crisis just as severely as he has indicted the South; what was Lincoln's understanding of the crisis in 1861, an understanding which he has rejected here in favor of a deeper understanding? It was that the war,was to save the Union; that the question of the abstract rightness or wrongness of slavery was mere agitation, a stumbling block to peace which would be overcome by the observation of the "dry legal" requirements of the Constitutional and the law. This interpretation, to which Lincoln tenaciously clung throughout the entire war, has here been rejected in favor of its antithesis; it was the overemphasis on legality, (and the resultant denial of the moral factor of slavery) which was the policy that would have ended the war with a "less fundamental and astounding" result.

But if the war was not fundamentally about saving the Union, then what was the ultimate reason for the war? Lincoln hinted in the preceding paragraphs that it was about slavery; now, he moved conclusively to stating that it was indeed the moral element of slavery which had brought the nation the scourge of Civil War: "Both (the North and the South) ... pray to the same God, and each invokes His aid against the other ... the prayers of both could not be answered; that of neither has been answered fully. The Almighty has His own purposes." Thus, the war was begun by men both North and South acting out of motivations that failed to encompass the true meaning of the war; yet, once started, the Almighty would use the war to His own purpose, a purpose that neither side had totally comprehended. Therefore, the removal of slavery from the

United States was effected by the will of God; therefore, the northern prayers for the end of the war went unheeded because they had been predicated upon the notion that the war was fought for the preservation of the Union, not for the end of slavery: the true purpose of the Almighty.

But what was responsible for the coming of the war? It is easy to understand Lincoln's interpretation that the war was used by the Almighty to eradicate the scourge of slavery from America; yet, with what lay the responsibility for the American secession crisis? In his next sentence, Lincoln indicted the northerners who accepted the legality of slavery as the price to pay for Constitutional Union; those who were willing to turn a blind eye to the immorality of the institution in return for assurances that the institution was legal. This indictment is a most eloquent statement of the inability of the political system of the United States to deal with an issue that contains a moral dimension; how the system is best constructed to determine legality and constitutionality, not abstract "rightness" or "wrongness"; how such a legal/constitutional predilection can be fatal when the dictates of such a system are at odds with what everyone understands to be the moral imperatives of the question. Here are Lincoln's words that assessed the responsibility for the secession crisis and the war: "Woe unto the word because of offenses! for it must needs be that offenses come; but woe to that man by whom the offense cometh." Having identified that the North (woe to that man by whom the offense cometh) as being equally responsible as the South (woe unto the world because of offenses) due to its acquiescence in the legality and existence of slavery[30], Lincoln is ready to make the assertion to which his entire address has been building: slavery was the cause of the war, and the war will continue until slavery has been eradicated: "If we shall suppose that American Slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war, as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him." He then moved on to the climax of his speech: the point that the secession crisis and the war were a direct

result of slavery's immorality and that the war will continue until the nation has paid its price for holding slaves and condoning slavery: "Fondly do we hope--fervently do we pray--that this mighty scourge of war will speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn by the sword, it must be said that the judgements of the Lord are true and righteous altogether."[31] Lincoln has arrived at his main point; the fact that northern blood has been shed so copiously to atone for the national sin of slavery must indicate that the North was just as morally responsible for the "scourge" of slavery as was the South. This moral culpability was found in its condoning and acquiescing in the institution during the nation's lifetime, attempting to defuse its potentially explosive moral context within a framework of legality, constitutionality, and compromise. As Lincoln's passage quoted here shows, he has come full circle from his assertions four years previous that the war was for the Union and slavery was merely a secondary concern. The fact that Lincoln was a member of the northern political process which he has so vigorously condemned here in his address speaks much about the guilt Lincoln must have felt for being associated with that process which, in its refusal to deal with the moral aspect of the slavery question out of a disinclination to leave the legal/constitutional framework of the government, hastened, in Lincoln's analysis of the war, the wrath of the Almighty upon the country. This conversion in Lincoln's thinking is made the more poignant by the fact that, within five weeks, he would be dead, felled by an assassin's bullet. Perhaps he would have thought it fitting; if the Civil War's death and destruction was punishment for the immorality of slavery, and if Lincoln's analysis of the war was correct, then perhaps only by the blood of the leader who had so badly misread the true nature of the slavery question from as far back as 1839 could the Almighty be satisfied. At any rate, at the end of his life Lincoln had grown to realize that the moral element of slavery, and the government's refusal or inability to deal with that element out of an excessive deference to legal niceties, was the main cause for the secession crisis and Civil War.

G. CONCLUSION

The purpose of this chapter is to show, by a juxtaposition of the political controversies examined in the previous chapter and the slavery controversy of 1848-1860, that the American political system is particularly unsuited to handle a controversy which contains a moral element. This assertion, in turn, is used to support the second element of the secession theory as postulated in the introduction; that is, that, in order to have a secession movement, one of the three elements that must be present is a characteristic of a factional crisis that makes the crisis particularly unsuited for adjudication by the national government. In the case of the United States, that characteristic was the moral character of the controversy; that is, the United States government is particularly unsuited, with its emphasis on legal and constitutional considerations, to adequately handle a national factional crisis when the factions are divided over an issue containing a strong moral element. The methodology chosen to make this point eschewed a detailed analysis of the failed compromises, both Congressional and judicial, which dotted the landscape of the mid nineteenth century, in favor of one which concentrated on the realization by one of the key participants in the crisis that the moral element of slavery was indeed the factor which hastened the process of secession and repaved the adjudication of the question outside legal constitutional, government channels. This process of realization is analogous to the process of realization that the country underwent after the Civil War, when it gave increased attention to the problem of eradicating slavery from the nation as it turned its attention to the reconstruction of the South. Thus, all though the realization of the importance of dealing with the moral element of slavery dawned on both Lincoln and the country too late to halt the secession movement of 1860-1861, their realization of the importance of this element holds important lessons for us today. In addition to the domestic lessons in which it offers instruction, it also acts as a validation for the secession theory posed in this thesis, and, as such, it acts as a guide for our own contemporary planning on an international scale. For in understanding our own government's weaknesses within the framework of the secession theory, the United States will be better able to understand,

plan for and influence the particular weaknesses of other governments faced with a secession crisis similar to the one faced by Abraham Lincoln in 1860.

CHAPTER IX ENDNOTES

1. This note will begin the legislative history of the attempt to deal with the slavery controversy at the Missouri Compromise of 1820. Beginning the legal history of the slavery controversy with the Missouri Compromise necessarily omits the political battle over slavery that took place from the Constitutional Convention in 1787 to the early years of the nineteenth century; however, as a starting place for the review of the legal process of the United States attempting to deal with the question of slavery, it is a convenient place from which to proceed. The legislative history of the Compromise of 1820 is fairly straightforward; yet, as seems the case with all political dealings with the South's peculiar institution, the seemingly straightforward nature of the problem belied the profound considerations of liberty, slavery, class, and race that were ever present in the American body politic in the first half of the nineteenth century, always simmering just below the surface of any political maneuvering directed towards the abolition or extension of slavery. In the early part of 1819, during the first administration of President James Monroe, there was before the Congress a bill that would enable the slave territory of Missouri to frame a state constitution and be admitted to the Union. On February 13, 1819, Congressman James Tallmadge of New York moved two amendments to this routine bill; the first would prohibit the introduction of any more slaves into the new state, and the second would free any Missouri slaves born after the state's admission into the Union at the age of twenty-five. (All historical events in this note related to the Missouri Compromise are from Freehling, William W., *The Road to Disunion: Secessionists at Bay 1776-1854*, Oxford University Press, New York, New York, 1990, p. 144.)

   Voting on these amendments in the House would demonstrate an ominous pattern that would again appear in the late 1840s when the volatile question of slavery's introduction into the territories of the United States was before the Congress; that is, the House vote did not divide along party lines, but, upon sectional lines. The fact that the Federalist party no longer commanded a large national following in 1820 diminishes slightly the importance of the criticality of the sectionalist split in 1820 at the expense of party loyalty, yet the numbers are interesting; both Tallmadge amendments passed the House on strict sectionalist splits: the first passed the House 87-76 (North 86-10 aye, South 66-1 no), and the second barely squeaked by 82-78 (North 80-14 aye, South 64-2 no). The bill was then sent to the Senate, where both Tallmadge amendments failed 22-16. A conference could not resolve the difference in the bills, and, as a result, there could be no statehood for Missouri in 1819.

   At the next session of Congress, proponents of Missouri statehood tried once again. This time, the action originated in the Senate, as Senator Jessie B. Thomas of Illinois attempted to link a bill outlawing the institution of slavery above the latitude of 36° 30′ with a bill which contained provisions for the admission of two separate territories: Missouri and Maine. This linkage of the three provisions of the Compromise worked, and the omnibus bill passed the Senate 24-20. It did not, however, have such smooth sailing in the House, and the omnibus bill containing the Compromise provisions could not pass. However, at the resulting Senate-house conference, all three bills were unlinked and sent back to the House and Senate for three separate votes. This strategy worked; all three provisions were passed separately by the House and the Senate, Missouri and Maine became states, and slavery was outlawed north of 36° 30′.

As the first attempt at constitutional adjudication of a crisis involving the question of slavery, the Missouri Compromise of 1820 produced results that would be harbingers of future conflict over the question of slavery. Some of these results are catalogued below. First, the question as it was framed was over slavery itself, not over some abstract theorizing over states rights or such mundane topics as a protective tariff. The founding fathers had taken great pains in their writing of the Constitution to ensure that the word "slavery" appeared nowhere therein; this particular instance reflects a general attitude that the word "slavery" was not to pollute the councils of government with its amoral stain. The Compromise of 1820 was the first major instance where the federal Congress was faced with a question involving slavery where it could not hide behind euphemisms and evasions of the issue. It was thus a useful precedent in that it brought the issue of slavery (or, more accurately, slavery extension) into federal councils for the first time.

Secondly, the Compromise indicated to the South its lessening of clout in the federal House of Representatives. The 3/5 clause of the Constitution (in which 3/5 the total slave population was to count for purposes of both federal representation and federal taxes) had granted a disproportionate number of representatives to the southern states; this disproportionate influence was felt in the popular house of the Congress, the House of Representatives. As the vote on the Tallmadge amendments to the Missouri bill indicated, the numerical superiority of the North was beginning to tell in the House; southerners could no longer look there for protection against federal encroachment. Therefore, increased importance was placed on the need to maintain an equality of slave/free soil representation in the Senate. No one was more aware of this trend towards northern numerical dominance of the South than John C. Calhoun, and be recognized early that the South, in order to be fully protected from a mere "numerical majority," must be protected by the concept of the "concurrent majority." In a democracy, numbers equal paver, and, as the Missouri Compromise showed, the South was well on its way towards being dominated by the numerically superior North.

This second result of the Compromise highlights the importance of the third: by banning slavery north of 36° 30′, the South was closing off an entire section of the nation to the further expansion of slavery. A glance at the map of the United States in 1820 shows that only two territories, Florida and Arkansas (out of which would be carved the present day states of Arkansas and Oklahoma) lay south of the demarcation line; whereas north of that line lay unorganized territory which stretched north from present-day Kansas to present day North Dakota, and west from present-day Michigan to the Pacific northwest. Any plan which would reserve the vast majority of the land to the free-soil North would doom the South to eventual minority status in both the House and the Senate. This question would particularly haunt the Congress at the end of the decade of the 1840s, as California would petition the Congress for entry as a free state with no southern territory set to "counterbalance" the two new free soil senators.

The fourth result was also detrimental to the South. It gained no practical advantage from this Compromise; yet it acquiesced in the precedent set for federal regulation of slavery in the territories. Until this provision of the Compromise was struck down by the Supreme Court nearly forty years later, there existed a federal law on the books regulating the importation of slaves into a territory of the United States. This danger was recognized by southern slaveholders such as Thomas Jefferson. Long pictured as a man who abhorred slavery and who "trembled for his country" when he thought of the retribution which would be visited upon the country for the peculiar institution, Jefferson actually hated the prospect of federal interference in the slavery question even more. (Jefferson to Adams, January 22, 1821: "Our anxieties in this quarter are all concentrated ... on the Missouri question ... The real question, as seen in the states afflicted with this unfortunate population is, are our slaves to be presented with freedom and a dagger? For if Congress has the

power to regulate the conditions of the inhabitants of the states ... it will be but another exercise of that power to declare that all shall be free ... is this the tocsin of ... a servile war?" Adams, interestingly, agreed with Jefferson that Congress should leave the problem to the southern states who understood the special requirements of keeping Negroes in bondage. Adams to Jefferson, February 3, 1821: "Slavery in this country I have seen hanging over it like a black cloud for half a century ... I have been so terrified of this phenomenon (a slave insurrection) that I constantly said in former times to the southern gentlemen, I cannot comprehend this object; I must leave it to you. I will vote for forcing no measure against your judgement." (Letters contained in Capon, Lester J., (ed.), *The Adams-Jefferson Letters, op. cit.*, pp. 570-571). At any rate, as the slavery controversy again heated up in the 1840s, this precedent of the federal Congress barring slavery within certain geographical boundaries would haunt the South, as the Congress would attempt to bar the admission of slavery into any territory gained as the result of the Mexican-American War.

For the purposes of this thesis, this brief review of the Missouri Compromise indicates one of the first attempts by the Congress as a whole to adjudicate a conflict brought about by the slavery issue within the Constitutional framework of the government. This attempt at a legal solution has all the hallmarks of a congressional Compromise; these characteristics of compromise, these unanswered questions and unsure precedents, would make the resolution of the problem far from final; within the next thirty years, the country would face another crisis brought about by the slavery controversy; this crisis would be more far-reaching that the Missouri crisis; and, therefore, its resolution would be more difficult to obtain and its compromises would be less satisfying to the extremists on both sides. Paradoxically, because of its seeming importance, this Compromise's resolutions would be proclaimed as "final," with the major parties, both the Whigs and Democrats, pledging to remain true to the Compromise as the final solution to the slavery controversy. (See Nevins, Allan, *The Fruits of Manifest Destiny 1847-1852*, from the series *Ordeal of the Union, op. cit.*, pp. 397-401, for an explanation of the finality with which the politicians of the day looked upon the Compromise of 1850). In reality, this next Compromise was nothing more than another attempt to contain the slavery controversy within the Constitutional adjudication framework, a framework that, by 1850, was proving itself inadequate to answer the moral questions of the issue which would not remain dormant.

The next major compromise attempted by the Congress was the Compromise of 1850. This compromise was the climax of a crisis which had been precipitated by the addition to the United States of territory gained from Mexico in the Mexican-American War. The introduction of the so-called Wilmot Proviso into the House of Representatives in 1848 as an amendment to a special appropriations bill, calling as it did for the exclusion of slavery from all the newly-gained territory, touched off a sectional outcry, especially since it managed to pass the House of Representatives (it later died in the Senate). The major feature of the Compromise was the admission of California into the Union directly (bypassing the territorial stage completely and therefore dodging the divisive issue of the status of slavery in the territories) as a free state in turn for a strictly enforced federal Fugitive Slave Law. This compromise demonstrated the tendency of the South to settle for compromises which had a symbolically high but practically nonexistent consequences. The South acquiesced in the admission of California as a free state. As such, they 1) put their equality in the Senate in jeopardy, an equality whose importance was underscored by the Wilmot Proviso's success in the popularly elected House; 2) guaranteed that California electors, with their probable free state bias, would cast their votes for free-soil candidates in the coming presidential elections; 3) refused to force a resolution on the legal status on slavery in the territories at a time when they were not badly outnumbered in the Congress and a Louisiana slaveholder occupied the president's office (though Zachary Taylor had

proven himself to be very unfriendly to both the Compromise and southerners' appeals to protect slavery). In return, they got a federal law that addressed a very minor problem: the return of runaway slaves. Paradoxically, the South, as if to underscore their symbolic, hollow "victory," made the enforcement of the Fugitive Slave Law the issue upon which they would test northern resolve to abide by the Compromise. Fortunately (or unfortunately, if you happened to be a runaway slave) President Millard Fillmore, who signed the Compromise bills into law, proved to be as good as his word in enforcing the Fugitive Slave Law. (See *Fruits of Manifest Destiny, op. cit.*, p. 389, for a discussion of Fillmore's zest in enforcing this piece of legislation.) All three of the men who occupied the presidency in the 1850s (a Whig, Fillmore; and two Democrats, Pierce and Buchanan) professed to be supporters of the Compromise of 1850 and the Fugitive Slave Law. Millard Fillmore, speaking of the former in his second annual message to Congress, praised the calming effects that the Compromise had brought to the nation: "The agitation which for a time threatened to disturb the fraternal relations which make us one people is fast subsiding." Speaking of the latter, Fillmore in the same message had strict words for those that would undermine the Compromise by interfering with the operation of the Fugitive Slave Law: "The act of Congress for the return of fugitives from labor is one required and demanded by the express words of the Constitution ... This constitutional provision is equally obligatory upon the legislative, the executive, and judicial departments of the government, and upon every citizen of the United States." Franklin Pierce, in his inaugural address, sounded the theme of Compromise for the sake of Union: "In expressing my views upon an important subject which has recently agitated the nation to a fearful degree, I am moved by no other impulse than a most earnest desire for the perpetuation of that Union which has made us what we are ... I hold that the laws of 1850, commonly called the Compromise Measures, are strictly constitutional and to be unhesitatingly carried into effect ... I fervently hope that the question is at rest, and that no sectional ... excitement may again threaten the durability of our institutions ... " As late as December 3, 1860, James Buchanan was decrying the flaunting of the Fugitive Slave Law as the major reason for the sectional crisis: "The most palpable violations of constitutional duty which have yet been committed consist in the acts of different state legislatures to defeat the execution of the Fugitive Slave Law ... Let us trust that the State legislatures will repeal their unconstitutional and obnoxious enactments. Unless this shall be done without unnecessary delay, it is impossible for any human power to save the Union." (Quotes above from Fillmore, Pierce, and Buchanan taken from Richardson, James D., (ed.), *Messages and Papers of the Presidents, Volume V*, Published by the U.S. Congress, 1900, pp. 113, 201-202, 629-630.)

2. This judicial resolution mentioned here is, of course, *Dred Scott v. Sanford*, 57 U.S. 393 (1857), in which the Court held, among other things, that 1) the laws of Missouri regarding the status of Scott applied to this case, and, since he had already lost in Missouri state courts, he was not a free man; and 2) the Missouri Compromise of 1820 was unconstitutional, in that any Congressional attempt to bar slavery in the territories would amount to an unconstitutional deprivation of property in violation of the fifth amendment to the U.S. Constitution. Interestingly, only three justices, far short of a majority, were to argue that no black man of slave ancestry could become a citizen of the United States. Almost every book on the 1850s will have a discussion of the Dred Scott case; a good reference for the breakdown of the justices legal reasoning in the case is Frank, John P., *Justice Daniel Dissenting, A Biography of Peter V. Daniel, 1784-1860*, Harvard University Press, Cambridge, Mass., 1964, Chapter 15. The title used in this context is misleading; Daniel actually concurred in the result arrived at by Chief Justice Taney, though he did write a separate concurring opinion. See also Nevins, Allan, *The Emergence of Lincoln, Douglas,*

Buchanan, and Party Chaos, Charles Scribners Sons, New York, New York, 1950, pp. 90-95, for an excellent reference for what the justices actually decided in the Dred Scott case. This attempt at a judicial resolution failed even more miserably than the political attempts at resolution; the decision was denounced in the North; demagogues demanded that it be disregarded and other northerners, more sensitive to legal scruples, concocted a theory that the decision was not a binding precedent and could legally be ignored. (See McPherson, James, *Battle Cry of Freedom,* Oxford University Press, Oxford, 1988, pp. 174-175, and Nevins, *op. cit.,* pp. 95-100, for northern attempts to blunt the impact of the decision.) Interestingly, in light of this chapter's emphasis upon the moral aspect of the slavery question, Nevins' first comment about the northern reaction was: "The storm of anger which instantly swept the North emphasized first and foremost the moral argument." As is the point of this chapter, it was this moral/legal dichotomy which made the judicial attempt to resolve the slavery controversy less than successful. At a less profound level, the Dred Scott case pointed out the difficulty of any judicial decree resolving a serious national dispute. Lost within the maze of jurisdictional questions (*i.e.,* was Scott actually a citizen of the state of Missouri so that the question was properly before the federal courts on the diversity of citizenship jurisdiction) and different approaches to legal reasoning was a resolution to the central question of the case. For an analogous case in contemporary federal jurisprudence, note the confusion which resulted from the nine opinions delivered by the Supreme Court justices in *Furman v. Georgia, Jackson v. Georgia,* and *Branch v. Texas,* all 1972 death penalty cases in which the Supreme Court declared "freakish" imposition of the death penalty to be "cruel and unusual punishment" within the scope of the meaning of the eight amendment. The delivering of nine separate opinions diluted the reasoning of the Court and made it extremely difficult to apply the desired standards when the states re-introduced and passed death penalty bills which attempted to conform to Supreme Court guidelines. (See Witt, Elder, *The Supreme Court and Individual Rights, second edition,* Congressional Quarterly, Inc, 1988, p. 216-219.)

3. The depth to which Lincoln felt his Whiggish principles, and the extent to which they influenced him throughout his presidency is covered in Donald, David, *Lincoln Reconsidered,* Vintage Books, New York, New York, 1961, in the chapter entitled "Lincoln, a Whig in the White House," pp. 187-208. This chapter proposes the theory that, except for attempting to influence the conduct of the war, Lincoln, in the tradition of a good Whig, left the affairs of government up to his cabinet. This may be true; it can also be argued that, except for the conduct of the war, nothing of importance really happened in Lincoln's administration. At any rate, the essay makes a good argument that Lincoln, having been an active Whig throughout his entire political career, "...was never able to disenthrall himself from his own political education." That education, of course, had been in the Whig tradition of weak presidents and strong cabinets. ("Whig in the White House," p. 200.)

4. This statement must be qualified, however, with the acknowledgement that Lincoln never hesitated in exercising executive power in the conduct of the war. Within this sphere, his assumed power knew few bounds. A short review of Lincoln's view of government, and how that view began to change once he was inaugurated president, would be informative here.

On January 12, 1848, an obscure Whig congressman from Illinois rose in the House of Representatives to give a speech concerning the conduct of the Mexican-American War. He scorned President Polk's assertion that the war with Mexico was provoked by Mexican aggression. He refuted the six points of evidence given by the president to prove that the southern border of Texas was the Rio Grande river. He lamented the fact that the war has

progressed for over twenty months with no peace treaty in sight. In an argument that has interesting implications for presidential war powers, he stated that he was dismayed by "...the continual effort of the president to argue every ... vote for supplies into an endorsement of the justice and wisdom of his conduct." He ended this speech by a description of Polk as follows: "He is a bewildered, confounded, and miserably perplexed man. God grant that he may be able to show there is not something about his conscience more painful than his mental perplexity." Having spoken those concluding observations, Abraham Lincoln finished a speech in which he had taken the president to task for misleading the Congress and, in effect, using those misrepresentations as justification for continuing an illegal war.

A little over thirteen years later, on March 4, 1861, the same man, Abraham Lincoln, was inaugurated as the sixteenth president of the United States. Before him, as he stated in his farewell to his friends in Springfield before beginning his journey to Washington, lay a task as great as the one that faced Washington. By that, he meant Washington had set the precedents for executive actions that had bound his first fourteen successors; now, he would be sailing into uncharted waters, where the precedents of the past would hold little utility for him when confronting this grave crisis of the Union. Seven southern states had seceded from the Union, and his job, as president, was to put down the Rebellion. As history would later show, he exercised an enormous amount of discretionary executive power in doing just that.

Within a month of taking office, Lincoln authorized Lieutenant General Winfield Scott to suspend the writ of *habeas corpus* at any point along the vital supply line that ran from Philadelphia through Annapolis Junction to Washington. (Fehrenbacher, Vol. II, p. 237. See end of note for complete citation). In his message to the special session of Congress convened due to the Rebellion, Lincoln defended his actions by claiming military necessity. This policy, despite the clear necessity of keeping open the only railroad link for northern reinforcements needed to protect the capital, seems to have troubled Lincoln. He stated: "It is with the deepest regret that the Executive found the duty of employing the war power ... forced upon him." This statement, taken on its face, is interesting. Lincoln seemed to be asserting that a crisis had forced the Executive to assume the "war power," the power to declare a state of war clearly reserved for the Congress. He rationalized his action: "He (the Executive) could but perform this duty, or surrender the existence of the government." He reassured the Congress that, after the Rebellion was suppressed, he would "then,as ever, be guided by the Constitution and the laws." He ended with a plea for Congress to conform its judgement to his for a speedy suppression of the revolt. For this and subsequent suspension of the writ *habeas corpus* Lincoln suffered much criticism. The magnitude of these suspensions can only be understood in the context of the mindset of Americans regarding the symbolism of this writ. Chief Justice John Marshall, writing in *ex parte* Watkins in 1830, articulated the significance of this aspect of the common law: "The writ of *habeas corpus* is a highly prerogative writ ... the great object of which is the liberation of those who may be imprisoned without sufficient cause." Additionally, the suspension of the writ in times of rebellion is addressed in Article I of the Constitution, the article which deals with the powers of the Congress. Thus, in his suspension of the writ, Lincoln was indeed standing on shaky constitutional grounds. Lincoln deemed the practice expedient, however, and by September 15, 1863, he had extended his original suspension to all persons held by military officers as spies, aiders or abettors of the enemy, prisoners of war; all personnel in the armed forces; all deserters; and all citizens resisting the enforcement of the Draft law.

There was a major constitutional difference between the two suspensions mentioned above. The first proclamation was issued unilaterally by the Executive; Congress was not

in session at the time. This action was, no doubt, exploited by political enemies of the president for partisan political profit, but the fact was that many people who sympathized with the policies of the new president were critical of the move, for no other reason than it cast the federal government as acting in a lawless manner. In a letter to several New York Democrats who had questioned the legality of some of his actions, Lincoln attacked the censure that had been directed against his administration " ... for the supposed unconstitutional action (of) making military arrests." He stated that he had employed only "constitutional and lawful measures" to suppress the Rebellion. He further expounded on the utter logical absurdity of feeling constrained by the Constitution from putting down a rebellion so obviously designed to destroy the Constitution. He accused the Rebels of conspiring to use "... freedom of the press, freedom of speech, and habeas corpus to keep ... among us a most efficient corps of spies, informers, suppliers, aiders and abettors..."(34) The logic here is somewhat twisted. First Lincoln claims to have acted under the Constitution, then he attacks the very provisions he claims to be following as contributing to the Rebellion. In other words, Lincoln is saying that the constitutionality of is actions is not a function of his adherence to the constitution, but a function of what is necessary to defend the document in such a time of crisis. His argument is that, paradoxically, in order to save the Constitution, he must violate its provisions. In this sense, not in a narrow legal sense but in a broader, more expansive sense, the preservation of the Union, lay his claim to the constitutionality of his actions. Lincoln proceeded to give a telling example of his point. If, at the beginning of the war, he said, had the government seized Robert E. Lee, John C. Breckinridge, Joseph E. Johnstone, and other Confederate generals, while they were still in the service of the United States, the Confederate war effort would have been adversely affected. Should he, had such a seizure been made, have been required to release them on a writ of *habeas corpus*? He goes on to say that, in light of his leniency earlier in the war, that he will eventually be blamed for making too few arrests, not too many. He closed his defense with. "I must continue to do so much as may seem to be required by the public safety."

Lincoln was sensitive to the public criticism of his actions in this area. In *ex parte* Merryman (17 Fed. Cas. 144, No. 9487, 1861), the Chief Justice of the Supreme Court, Roger B. Taney, declared such an action illegal. Lincoln effectively ignored the judgement (*i.e.*, the suspension remained in force), yet Lincoln, in his subsequent suspensions, did seek and obtain the prior approval of Congress. Therein lay the constitutional difference between his 1861 and 1863 proclamations; the former was executed unilaterally, the latter only upon authorization by Congress. Lincoln was to issue four proclamations suspending the writ. Only in issuing the first one did he act without authorization from Congress.

Other seemingly extra-constitutional acts were undertaken by Lincoln during this war. He issued a Proclamation of Blockade in which, acting in his capacity as commander-in-chief, he closed all the ports in the states in rebellion against the Union. Since a blockade is an act of war, Lincoln appeared here to be usurping the war power granted to the Congress. Article I, section 8 of the Constitution reserves to Congress to right to call forth the militia to suppress insurrection; on April 15, 1861, Lincoln ordered it by executive proclamation. His actions in Maryland, Kentucky, Missouri, and Delaware to keep these states in the Union involved both delicate diplomacy and hard-fisted policy; for example, he agreed not to transport northern troops through Baltimore in order to limit the amount of violence in that rabidly pro-southern town, while at the same time federal troops arrested and detained pro-secessionist legislators to prevent them from voting to take Maryland out of the Union. (see Catton, Bruce, *The Civil War*, American Heritage Publishing Company, New York, New York, 1982, p. 63) Such actions were unquestionably illegal, yet all were necessary. The actions in Maryland especially so; if that state were to have seceded,

Washington D.C. would have been located within the boundaries of the Confederacy, and the government would have had to been evacuated. (All quotes from the above section come from Fehrenbacher, Don, (ed.), *Collected Speeches and Works of Abraham Lincoln*, Vol. I and II, Literary Classics of the United States, New York, New York, 1989; the citation from *ex parte* Watkins and the assertion that Lincoln issued four proclamations suspending the writ of *habeas corpus*, one without the expressed consent of Congress, come from U.S. Senate Document 82, 92nd Congress, *The Annotated Constitution*, pp. 623, 365, respectively.)

Thus, as can be seen from the above analysis, the sentiments expressed by the author of "Lincoln--A Whig in the White House" (see note 3 above) notwithstanding, the proposition expressed here concerning Lincoln's predilection for limited government must be considered in light of Lincoln's enormous assumption of power during the Civil War. However, within the context of the assertion (*i.e.*, that Lincoln did not believe until late in his political career that the federal government had the power to eradicate slavery in the states where it already existed), it is accurate to say that Lincoln saw the power of the president constrained by law.

5. Just like many general statements about Lincoln and the slavery controversy, this one is somewhat of an simplification. Though it is accurate to assert that Lincoln demonstrated a heightened sensitivity towards the question of the property value of slaves, there are some indications in his actions as president that he was able to see beyond the due process/property approach when it came to dealing with the peculiar institution. For example, in his annual message to Congress on December 8, 1863, Lincoln spoke of his adamant refusal to return a freed black to slavery even if in involved a state which wanted to return to the Union: "But if it be proper to require, as a test of admission to the political body, an oath of allegiance to the Constitution of the United States and the Union under it, why also to the laws and proclamations in regard to slavery ... to abandon (these laws and proclamations) would be not only to relinquish a lever of power, but would also be a cruel and astounding breach of faith ... nor shall I return to slavery any person who is free by terms of that Proclamation, or by any of the acts of Congress." (Annual Message to Congress, contained in Fehrenbacher, Don, (ed.), *Lincoln: Speeches, Letters, Miscellaneous Writings, Presidential Messages and Proclamations, Vol. II*, The Library of America, New York, New York, 1989, p. 552.) This attitude recognizes the fact that, the justification of the Emancipation Proclamation as a war measure notwithstanding, the return of a rebellious state to the Union would not negate the effect of the Proclamation in that state in that, though no longer justifiable as a war measure, its provisions would still be in force. Lincoln apparently thought that a policy that returned freedmen to slavery was too "cruel" to contemplate. Further evidence exists of Lincoln's unwillingness to return slaves to bondage, constitutional concerns about property notwithstanding. In December of 1863, in his Proclamation of Amnesty and Reconstruction, Lincoln resolved to pardon all those who had been previously in rebellion against the Union (contingent upon their taking an oath of loyalty to the Union) and to return to them all confiscated property except slaves. (Proclamation contained in Fehrenbacher, *op. cit.*, pp. 555-558.) This exception shows that Lincoln was beginning to see slaves in a light different from that in which he had viewed them in his Emancipation; that is, they were human beings, not property to be confiscated to hinder the Confederate war effort.

6. Basler, Roy, (ed.), *The Collected Works of Abraham Lincoln, op. cit.*, volume I, p. 126.

7. *Ibid.*, p. 260.

8. The structure and the language of the bill placed Lincoln firmly in the camp of those who believed in slow, gradual emancipation with the concurrent attendance of 1) compensation for lost property and 2) exclusion of free blacks from the jurisdiction that had just freed them. This idea of the inability of the white and black races to live in peace never left Lincoln, and to the end of his life he was a firm believer in the utility of colonization; *i.e.*, the removal of the freed black slave to a foreign shore, either in the Caribbean or, as was eventually attempted, Africa itself. This dual demand for compensation and colonization starkly define the unique legal standing of the black slave in American (federal and, especially, state) law. The compensation demand was a recognition of the property valve of slaves; the fifth amendment to the U.S. Constitution guarantees that no one shall be deprived of his property without due process of law and just compensation. Therefore, in demanding the compensation element of this gradual emancipation theory, the proponents were recognizing the fact that the slave was, indeed, property. However, in making the concurrent colonization demand, the proponents of this gradual emancipation theory were recognizing the unique human element of this race which had been confined by law to its status as mere property. In recognizing the fact that the newly freed slaves could never live in peace with their former masters, the colonization proponents were giving tacit acceptance to the fact that the black slaves were indeed human, not property; a slaveholder could live in peace with his farm and livestock and other property; yet, once his slaves were freed, peaceful coexistence with them would be impossible. This illogical understanding of the nature of slavery, this seeming contradiction between the property and social aspects of slavery, appeared to give the South little problem; the southern states were very efficient in designing laws specifically designed to control the actions of their special "property." It was not for nothing that slavery was known as the "peculiar institution." Lincoln, in this House Bill, in its demand for compensation and the exclusion of free blacks, mirrored this dual understanding of the nature of slave "property." Lincoln's House bill lacks the requirement for forced colonization which marked many of the southern attempts at emancipation during 1820-1830 (see Freehling, Alison Goodyear, *Drift Toward Dissolution, The Virginia Slavery Debates of 1831-1832*, Louisiana State University Press, Baton Rouge, LA, 1982, pp. 92-94, 177-178, 180-184, for an excellent discussion of the debate in the Virginia state legislature, not on whether colonization was to be required with emancipation, but rather whether it should be voluntary or mandatory). However, as president, he warmly endorsed the concept of colonization for the newly freed slaves (see Basler, (ed.), *op. cit.*, volume VII, p. 417, note 1. This passage shows that, as late as 1864, Lincoln was in communication with the Congress concerning the colonization of freed slaves in either the Caribbean or Africa.).

9. This practice of selling a slave "downriver" just prior to an emancipation law taking effect is detailed in Freehling, *Secessionists at Bay, op. cit.*, in the chapter entitled "The Missouri Compromise." This practice highlighted the fact that, in many jurisdictions (including those of the "free" North), the main motivation for the emancipation legislation was less freedom for the blacks than it was the desire to remove blacks entirely from the given jurisdiction. See Freehling, *Drift Towards Dissolution, op. cit.*, for a discussion of the desire of Virginia's white laborers to eliminate competition between themselves and freed blacks for scarce employment by forcing all freed blacks to emigrate out of state.

10. The federal Fugitive Slave law appointed federal commissioners who would hear the case and determine whether or not the owner should have the fugitive returned to him as a slave. The federal law provided only a rudimentary due process to the accused black. The hearing would not be before a judge; rather, it would be before a specially-appointed

federal commissioner, who would hear the case with no jury. This commissioner would receive a fee of $10.00 if he decided in favor of the owner and $5.00 if he decided in favor of the alleged slave. The disparity in fees were explained by the fact that more administrative paperwork was required if the alleged slave were returned South. Detractors of the law called the disparity in fees a bribe to get the commissioner to decide for the owner. One northerner remarked that the law fixed the price of a Carolina slave at one thousand dollars, and that of a Yankee soul at five. See Nevins, Allan, *Fruits of Manifest Destiny, op. cit.*, pp. 380-381 for a description of all the provisions of the federal fugitive Slave Law of 1850. Even though the due process provisions of this law were meager, they were more than what Lincoln's proposed bill would have guaranteed an accused fugitive.

11. Some very influential and intelligent southerners did the best they could to make the moral decision less than clear-cut. See Paskoff, Paul F., and Wilson, Daniel J., (eds.), *The Cause of the South, Selections from De Bows Review*, 1846-1867, Louisiana State University Press, Baton Rouge, LA, 1982. See especially in this book essays "Diseases and Peculiarities of the Negro Race" by Dr. Samuel A. Cartwright; "Climates of the South and Their Relations to White Labor" by Dr Josiah C. Nott; "The Night Funeral of a Slave" by an anonymous author; the first two essays attempted to prove scientifically that slavery was beneficial to both the black race (who were taught Christian principles and the work ethic) and the white race (which was particularly unsuited to working in the hot climate of the southern cotton states). The last essay was a sentimental account of the funeral of a slave which attempted to paint an idyllic picture of life on a plantation. These essays joined a host of southern literature which sought to blur the distinction between the moral absolutes of slavery.

12. When speaking of law here, I am speaking specifically of state law. Strictly speaking, the status of slaves in federal law was still an unsettled question. Lincoln was to argue in his debates with Douglas in 1858 that the founders who framed the Declaration of Independence meant for the Negro to enjoy the rights of citizenship; a federal answer to this question was partially framed by the Dred Scott decision; however, only a minority of three justices could be mustered to declare that a slave could never be a citizen. (See note 2 above.) The federal question of slavery and citizenship was finally settled by the fourteenth amendment to the U.S. Constitution; of course, by the time the fourteenth amendment had been ratified, slavery had already been outlawed by the thirteenth amendment.

13. It can be argued that Lincoln had been fairly politically isolated during the 1850s; compared to Douglas and other national politicians, this is a true statement. However, the record indicates that, at least on a statewide scale, Lincoln was very active in politics during this tumultuous decade. See Basler, *op. cit.*, Volume II, pp. 247, 320, and 361-373, for just a few examples of Lincoln's political activity during this decade.

14. See note 4, for example, for Lincoln's extra-legal rationale for his first suspension of the writ of *habeas corpus* as president.

15. It would be an oversimplification to say that Lincoln acted so conservatively towards emancipation out of nothing more than an oversensitivity towards the legal aspects of the question. He was under tremendous political pressure from both conservatives and radicals regarding his actions on slavery. He was the nominal leader of a Party whose ranks hailed from all across the political spectrum, from radicals like William Seward and Slamon P. Chase to conservatives like Montgomery Blair of Maryland. (All three of the above

mentioned examples served in Lincoln's cabinet; this gives some idea of the ideological balancing act that Lincoln was required to orchestrate to keep both wings of the Republican Party satisfied.) In addition, he faced the extremely difficult and delicate task of keeping the four border states (Missouri, Kentucky, Maryland, and Delaware) in the Union during the initial months of the conflict. On the other hand, a declaration by Lincoln that the war was being fought to free the slaves, while a potential political disaster domestically, would probably have aided the Union cause abroad, costing the South much needed support from European powers in their struggle against the North. Therefore, these political considerations, both domestic and foreign, each calling for seemingly contradictory policies, were as important as the legal considerations mentioned in the chapter in causing Lincoln's hesitancy towards taking any extra-legal steps regarding his emancipation policy.

16. He had been persuaded by his Secretary of State designate, for example, to soften the tone of his first inaugural address to make it appear less provocative towards the South. His original draft's closing line was: "With you, and not with me, is the solemn question of: Shall it be peace, or a sword." Under prodding by Seward, Lincoln agreed to change his ending into one drafted by the Secretary of State designate. However, he reworked and edited Seward's clumsy and awkward prose into the address' beautiful lyrical conclusion.

17. *Lincoln's First Inaugural Address,* Basler, *op. cit.,* pp. 262-263.

18. The term "imperfectly supports" was a change from the original draft of the address; the change was from "the moral sense ... is against the law" to "the moral sense ... imperfectly supports the law." Lincoln's change from the harsher phrase to the softer phrase seems to indicate that he is unwilling or unable to admit that the moral sense of the people is actually overriding their natural inclination to support the law; hence, they are not "against" the law on moral grounds; they merely are "imperfectly" supporting it. This another good example of Lincoln's desire for the moral reservations against slavery to be subordinated to the legal realities of slavery.

19. Basler, *op. cit.,* Volume IV, pp. 266-267.

20. Lincoln must have included the passage about the southerners' support of the suppression of the slave trade for balance only. Certainly, he could not equate Northern moral concerns over slavery to a perceived concern on the part of the South that some Africans were being denied the benefits of slavery due to a suppression of the slave trade. There is, in fact, evidence that the people of the South, contrary to Lincoln's assertion that they were only observing the "dry legalities" of the ban on the slave trade, actually did desire that the slave trade be banned. When the Confederate leaders drew up the Confederate States' Constitution after secession, they were, naturally, quick to assert its citizens, rights to carry their slaves into any new territories the Confederacy might acquire; yet, the ban on the slave trade, enshrined in the Federal Constitution in 1787, was carried over to the Confederate Constitution as well. The slave trade continued to be illegal in the South even during the Civil War. (Confederate Constitution, Article I, section 9: "The importation of Negroes of the African race, from any foreign country, other than the slaveholding states or territories of the United States of America, is hereby prohibited.")

21. The title and scope of this act is given in Basler, *op. cit.,* Volume V, p. 336.

22. As covered in 15, legal considerations were not the only factor Lincoln had to consider; political ones were important as well. However, there is evidence that Lincoln took the property rights in slaves very seriously, at least as they applied to owners who remained loyal to the Union. In his second message to Congress, December 1, 1862, one month before the final Emancipation Proclamation was issued, Lincoln proposed that the Congress pass the following Constitutional amendment: "All slaves who shall have enjoyed actual freedom by the chances of war ... shall be forever free; but all owners of such, who shall not have been disloyal, shall be compensated for them." Lincoln's concern for a slaveowners property rights seemed to be a function of whether the owner remained loyal to the Union. In the same message, incidentally, Lincoln continued to sound the theme of the resolution of slavery within a political context, a theme, we shall see later, he was to reject outright in his second inaugural address. The above mentioned amendment was part of a scheme Lincoln conceived for emancipation, a scheme which incorporated both compensated voluntary state emancipation and voluntary colonization. He characterized this scheme as a "...compromise; but it would be a compromise among the friends ... of the Union. These articles (of amendment) are intended to embody a plan of ... mutual concessions. If the plan shall be adopted, it is assumed that emancipation will follow, at least, in several of the states." (Fehrenbacher, *op. cit.*, volume II, pp. 406-408.) In proposing this political compromise, Lincoln showed himself willing to make emancipation a voluntary state action, with no guarantee that it would ever take place, as late as early 1863. Again, this willingness, born of a theory of the utility of political compromise on moral issues, would be rejected outright by the Lincoln of 1865, who would come to see the Civil War as God's punishment on the nation, both North and South, for slavery: on the South for slavery's existence, and on the North for that section's acquiescence in the institution's existence. But Lincoln in this period of his presidency was still willing to cut political deals to save the Union, deals which would not guarantee the extinction of slavery.

23. The utility of recognizing, facing, and addressing the moral aspect of the racial question inherent in the slavery question would be demonstrated almost a century later by President John F. Kennedy in his decision to commit his administration to the ideals of the Civil Rights movement in the teeth of fierce southern resistance. The political realities were evident; Kennedy had narrowly squeaked by Richard Nixon in the election of 1960; the "solid South" was one of the major reasons for his victory. Kennedy and his advisors realized the inherent danger of addressing the Civil Rights issue only one year before the election; yet, persuaded by the righteousness of the Civil Rights cause, (and the realization of the importance of urban northern blacks to his carrying of the industrial northeast), Kennedy faced the issue head-on. In a nationally televised speech on June 11, 1963, Kennedy said: "We are confronted primarily with a moral issue. It is as old as the Scriptures and as clear as the American Constitution." This recognition of the moral dimension of the problem did cause Kennedy some political problems down South; it was the political fallout occasioned in part by his Civil Rights policy which induced him to take a fence-mending political trip to the South five months later. Yet, his realizing that the moral dimension of the problem was consistent with the Constitutional issue sets him apart from Lincoln in that Lincoln saw the moral and Constitutional imperatives as mutually exclusive. This issue of Kennedy and the moral/legal/political dimensions of the Civil Rights issue is covered in Schlesinger, Arthur M., *A Thousand Days*, The Riverside Press, Cambridge, Mass., 1965, pp. 924-977.

24. Of all the extra-legal actions undertaken by Lincoln during the War Between the States, it is probably accurate to say that no act has been so misunderstood, so incorrectly perceived, as the Emancipation Proclamation of January 1, 1863. To gain a little greater understanding of the document than what can be gleaned from the discussion in the text, let us proceed to examine the document here in a little more detail. Hailed today as one of Lincoln's greatest state documents, distinguished as the instrument whereby slavery was exorcised from the country, the Proclamation was justified by Lincoln as a military expediency whose sole purpose was to hasten the end of the conflict by removing from the southerners their large labor force that allowed their farms to produce cash and subsistence crops while the armies remained in the field. Lincoln's own words on the subject made clear his objective. In the first place, he acted with in scope of "...the commander-in-chief ... in time of actual armed rebellion against the ... government of the United States"; therefore, this was a property confiscation order. He stated his opinion that the newly freed slaves could be accepted into the armed service for garrison duty. Then, it seemed as if it occurred to him that this proclamation, unlike his other war powers proclamations, might have a dimension that went beyond the mere military expediency understood by the commander-in-chief. Thus, he closed this proclamation by invoking: "...the considerate judgement of mankind, and the gracious favor of Almighty God." This closing, in which the practical (military necessity) is blended with the moral (the abolition of slavery), seems to suggest that Lincoln was looking beyond the mere war power significance of the proclamation and realizing the profound implication of erasing with a single stroke of his pen the one moral issue that had dogged his conscience since he entered public life. This question of Lincoln's attitude towards the question of abolition is important when trying to get at the real purpose of the proclamation. Lincoln himself tried to deflect the comments about it towards the military necessity argument. In a letter to Salmon P. Chase on September 2, 1863, he unequivocally stated: "The original proclamation had no constitutional or legal justification, except as a military measure." Even earlier, as a senatorial candidate in 1858 and as president-elect in 1860, as this paper has already shown, he constantly reaffirmed his pledge not to disturb slavery in the states in which it already existed. This pledge was, in part, a plan first to soften his image as a radical abolitionist on the slavery question (which he obviously was not) to increase his appeal to the electorate; secondly, as president-elect, to induce the frightened states of the Deep South to return to the Union. Perhaps Lincoln felt a need to maintain consistency between his earlier non-molestation pledges and the Emancipation Proclamation; this would explain his insistence upon its interpretation as a war measure alone. Indeed, he was loathe to enforce its provisions in slave states which were not in rebellion against the Union, and against whom the Proclamation claimed no jurisdiction. At the same time, Lincoln maintained a moral abhorrence to the institution. His speeches and writings from his service in the House in the 1840's until his death in 1865, with very few exceptions (which usually occurred when he was canvassing *southern* Illinois for votes), speak of slavery as a national evil; as a blight on a republican form of government. Surely those sentiments, nurtured over a lifetime of political combat, were somewhat on his mind as he penned his famous proclamation. At any rate, for the purposes of this paper, either as an amoral military act or as an act to rectify a gross national injustice, the Emancipation Proclamation can be viewed as a clash between the moral absolutes and legal imperatives engendered by the political, legal, and moral struggle over slavery; a struggle, as this paper argues, the Constitutional adjudication process of the United States government was particularly unsuited to handle. (All quotes from Lincoln's Emancipation Proclamation and his letter to Salmon P. Chase in this note are from Fehrenbacher, *op. cit.*, volume II.)

25. Basler, *op. cit.*, Volume V, p. 331.

26. Even with the disclaimer about the true purpose of the war Lincoln felt compelled to put at the beginning of this proclamation, even with the legalistic maneuvering and the political considerations that blunted the moral force of the document, and even with the limited applicability of its effect, this pronouncement from the Proclamation, coming as it did two years into the Civil War and two centuries after slaves were first introduced into America, still rings with a forceful and majestic effect.

27. The text of the final Emancipation Proclamation, issued on January 1, 1863, can be found in Basler, *op. cit.*, volume VI, pp. 28-30. Lincoln continued to downplay the moral significance of the Proclamation. On September 13, 1862, a mere nine days before he issued the preliminary Proclamation, Lincoln had this to say about the moral aspect of the Proclamation: "What good would a proclamation of emancipation from me do, especially as we are now situated? I do not want to issue a document that the whole world will see must necessarily be inoperative, like the Pope's Bull against the comet ... I have the right to take any measure which may best subdue the enemy ... I view the matter as a practical war measure, to be decided upon according to the advantages and disadvantages it may offer to the suppression of the rebellion." (Basler, *op. cit.*, Volume V, pp. 419-425.) After the Proclamation was issued, Lincoln continued to think of it in practical terms; in a letter to his vice-president, Hannibal Hamlin, Lincoln acknowledged that he enjoyed the adulation he was receiving throughout the North for the proclamation, yet he was disappointed by the lack of practical results; *i.e.*, the decline in enlistments in the Army since the proclamation was issued. Lincoln to Hamlin, September 28, 1862: "The North responds to the proclamation sufficiently in breath; but breath alone kills no rebels." (Basler, *op. cit.*, Volume V, p. 444.)

28. See, for example, the series "Presidential Inaugurations," airing on the Arts and Entertainment Network, in the week prior to January 20, 1988, in which historians of both the House of Representatives and Senate expressed the opinion that Lincoln's Second Inaugural Address was the greatest inaugural address ever given (the worst: William Henry Harrison's, given March 4, 1841).

29. This idea of a new understanding of the slavery question primarily in terms of its moral element late in Lincoln's life is from Forgie, *Patricide in the House Divided, op. cit.* Forgie presents this new understanding as a psychological defense mechanism to shield Lincoln from the tremendous personal guilt that he must have felt at the end of the war. According to Forgie, blaming the entire matter on God, seeing the Civil War as God's punishment on the nation for slavery and not as a war brought on by his awn personal ambition for immortality, was a convenient way for Lincoln to escape any responsibility for the carnage of the war. There is, perhaps, some truth to this assertion; yet Lincoln certainly was conscious of the moral dimension of slavery long before 1865; he had merely subordinated its importance; he had not completely disregarded it. Forgie's argument that Lincoln was trying to escape responsibility for the war is somewhat refuted by Lincoln's inclusion of his generation (and, by implication, himself) as the agent through which the "offense cometh." All quotes from the Address in the chapter are from Basler, *op. cit., Lincoln's Second Inaugural Address.*

30. This note will develop the theme that Lincoln was indicting his generation as well as the preceding generation for the nation offense of slavery. Forgie gives a different interpretation. He says Lincoln is referring only to the founders when he says: "Woe to him by whom the offense cometh." (Forgie, p. 291). It is true that Lincoln did mean to

encompass the founders in this indictment. This can be shown by completing the biblical verse from which Lincoln drew this quote: "Woe to him by wham the offense cometh ... he would be better off thrown into the sea with a millstone around his neck than to give offense to one of these *little ones*." (emphasis added, quote from Luke 17:1) Lincoln obviously is including his generation as the little ones whom the founders mislead by their condoning of the institution of slavery and their passing on its problems to the next generation of political leaders.

Yet, while it is true Lincoln included the founders as the one by whom the offense came, Forgie is wrong in his assertion that *only* the founders were indicted; Lincoln meant to include his generation in the indictment also. This can be shown by a later quote in the Address, in which Lincoln defines the Civil War as the "woe due to those by whom the offense came." To whom could Lincoln have been referring here? The founders are all dead; they are not suffering the scourge of Civil War. Lincoln must be referring here to *his* generation, and by implication to himself, when he identifies the ones suffering from the Civil War as the ones by whom the offense came. With this dual indictment of both the "fathers" and the "sons," Forgie's projection explanation loses some of its force, since Lincoln was including himself and his generation in his indictment of those who had brought about the Civil War. I believe that a better explanation of this conversion that brought about a more profound understanding of the moral issue of slavery on the part of Lincoln was the fact that Lincoln realized the premise upon which the second element of the secession theory of this thesis is based; that is, it was the overemphasis on the political and legal aspects of the slavery question, to the detriment of the moral aspect, that led to the Civil War. That the political and Constitutional adjudication rubric, in the framework of which the nation's political and legal affairs are conducted, is insufficient to adjudicate questions in which the moral considerations run contrary to the political and legal considerations. Both Lincoln and his generation, together with the political leaders of the past generation, were guilty of this overemphasis on the legal/political dimensions of the slavery question; and therein lies the rationale for Lincoln's indictment of both generations for the coming of the Civil War: not a psychological projection to ease his guilt (as Forgie argues), but rather an understanding of the fact that the moral dimension of the question should have been stressed from the beginning, the peculiar inability of the American political system to deal with that dimension notwithstanding.

Another period from Lincoln's past, not covered in this chapter, which could be used to illustrate Lincoln's realization that the constitution set up a government which was inadequate to address the moral dimension of slavery; his debates with Stephen Douglas in the fall of 1858, when he was running for the Senate. Lincoln's interesting approach was to use the Declaration of Independence, not the Constitution, with which to argue the moral dimension of slavery. Stephen Douglas, in his reply to Lincoln on September 8, 1858, remarked on the extra-legality (assuming the Constitution as the fundamental law of the land) of Lincoln's approach: "Lincoln maintains that the *Declaration of Independence* asserts that the Negro is equal to the white man ... I say to you in all frankness, gentleman, that in my opinion a Negro is not a citizen, cannot be, and ought not to be under the *Constitution* of the United States." (Basler, *op. cit.*, volume 3, p. 177). In *Inventing America*, Garry Wills remarks on this tendency of Lincoln to rely on the Declaration as the pure expression of the national ideal, the foundation principles upon which the nation was based; and his concurrent tendency to see the Constitution as a betrayal of these national ideals due to the compromises that went along with it. (Wills, Gary, *Inventing America*, Vintage Books, New York, New York, 1979, pp. viv-xviii). I believe this is somewhat of an exaggeration; Lincoln never rejected the Constitution as President; in fact, the argument can be made that in the midst of a Civil War, a war of national survival, his adherence to the

Constitution was indeed remarkable. (For example, the very fact that Lincoln stood for reelection in the middle of the war indicates that he took Constitutional mandates seriously.) What this reliance upon the Declaration does show is not Lincoln's rejection of the Constitution, but Lincoln's recognition that the rubric provided by the Constitution was insufficient to contain the moral element of the question. That is the importance of this recognition to this thesis; Lincoln recognized that the political adjudication process available under the Constitution was inadequate to settle the moral questions raised by slavery. He sought refuge, therefore, in the Declaration of Independence, a document which set forward principles which could be used to make an argument against the immorality of slavery.

31. One of the remarkable aspects of the Reconstruction period which followed the Civil War was the vigor exhibited by the federal government to eradicate both slavery and the racial stigma attached to the former victims of the peculiar institution. This inclination must have stemmed, in no small degree, from the feelings of moral culpability which Lincoln articulated in this Second Inaugural Address. Historians had long portrayed the period of Reconstruction as a period marked by hateful revenge directed at the defeated South by the victorious North; while it cannot be denied that some northern politicians were motivated by desire for revenge, it must be admitted that the spirit which animated the Congress during the period of Reconstruction was not revenge, but instead a desire to heed Lincoln's resolve to ensure that the dead from the War had not died in vain. (The best work that presents this "revisionist" view of Reconstruction is Foner, Eric, *Reconstruction, America's Unfinished Revolution, 1863-1877, op. cit.*) A virtual avalanche of civil rights legislation poured forth from the Congress during these years: three Constitutional amendments (the 13th, 14th, and 15th) and four major Civil Rights bills (1866, 1870, 1871, and 1875), indicating that the sentiments he had expressed it that speech went far in motivating the statesmen and politicians of the Reconstruction era.

ADDENDUM TO CHAPTER IX ENDNOTES

A further note needs to be made here concerning the differences between the second element of the secession theory proposed in this thesis (*i.e.*, that it was the moral dimension of slavery which removed the resolution of the secession crisis from American political/legal adjudication) and the theory for the coming of the Civil War proposed in George Forgie's book *Patricide in the House Divided, A Psychological Interpretation of Lincoln and his Age*, a book which was mentioned frequently in both the text of this chapter and in the endnotes. To paraphrase Forgie's arguments (and paraphrasing does not do them complete justice):

1) many men of Lincoln's generation, driven by a desire for the immortality which had been denied them by the founding fathers immortal fame, would turn instead to destruction of the Union to gain that immortality;

2) by attributing this characteristic to Stephen Douglas and others who were engaged, Lincoln believed, in a conspiracy to spread slavery throughout the slave and free states alike, Lincoln set up a new avenue by which he could gain everlasting immortality; not as the founder or destroyer of the nation, but as its savior;

3) this subconscious desire, this desire to gain the immortality which was reserved in his day exclusively to the fathers, led him to embrace the prospect of a civil war insofar as, by leading the nation to victory in the fratricidal conflict, he would indeed be hailed as the savior of his country;

4) finally, in 1865, staggering under the guilt occasioned by seeing the carnage and destruction brought about by the war, a war he had subconsciously desired as his mechanism to gain immortality, (and under the guilt he felt for having destroyed the political opponent he had perceived as the nation's potential destroyer, Stephen Douglas), he was able to deal with that guilt only by seeing the war not as a mechanism he used to gain his status as savior, but rather as an instrument of Almighty God to purge the land of slavery and exact a punishment on the land for the moral trespass of slavery.

Only by seeing the war as the inevitable punishment of God, and not seeing it as the logical result of his own desire for immortality, could Lincoln, by such a projection deal psychologically with the terrible consequences of the war.

Do these assertions, if they are true, invalidate the secession theory proposed in this thesis? The tension between Forgie's theory and the secession theory proposed here is obvious; the letter proposes that slavery, and the subsequent inability of the American political system to successfully adjudicate the secession crisis precipitated by slavery due to that issue's moral dimension, as the main cause of the conflict; the former sees slavery only as a issue peripheral to the main motivation of the major actors in the secession drama, an issue to which the objection raised was not as to its immorality, but rather as to its place in a larger conspiracy to destroy the form of government bequeathed the nation by its founding fathers. The latter interprets Lincoln's second Inaugural Address as a final recognition of the vital importance of the slavery question, an importance which had been lost on both the president and his generation in the decades leading up to the Civil War, a penalty for which omission the nation paid by the carnage of the war; the former interprets this Address as nothing more than a psychological projection of the responsibility for the war from the president to God, a projection whose cynicism is not mitigated by the fact that it is done subconsciously. I believe, however, that Forgie's interpretation, though it goes far in presenting a well-documented and fascinating study of Lincoln's possible motivation to action in 1860, by relying solely on this psychological interpretation it does not present a total picture of Lincoln's mind regarding the secession crisis. Thus, I feel that the secession theory's validity is left intact by Forgie's argument, not because Forgie is wrong, but because his interpretation is incomplete. In other words, neither theory refutes the other; insofar as they both represent different approaches to the question of Lincoln's intellectual and psychological picture of the war, they complement one another, as both give a reasonable interpretation of the events of that period. In other words, Lincoln could have rationally arrived at the decision that the moral aspect of slavery, as its disregard by the politicians of the 1850s in favor of political and legal considerations, was the true cause of the Civil War which had consumed so many lives. At the same time, this rational, conscious, realization could have dovetailed nicely with the psychological interpretation of Forgie; thus, Lincoln could have arrived at similar conclusions by two different

paths, one a conscious realization of the importance of slavery's moral aspect, the other a subconscious attempt to lessen the guilt Lincoln felt for the death and destruction occasioned by his policy of 1861. The fact that the latter path travelled through the subconscious does not mean that it is any more important than the former path, which travelled through Lincoln's conscious mind. Therefore, by seeing the theories as complementary, not mutually exclusive, Forgie's interpretation does not invalidate the secession theory; rather, it augments and illuminates it.

Having argued that Forgie's theory and the secession theory are complementary, let me now list two reasons why I feel Forgie's argument is incomplete. The first reason is that, while Forgie puts the emphasis solely on Lincoln's desire for immortality, and paints Lincoln's view of the slavery crisis solely as the part of an even larger conspiracy which he must combat to become the country's savior, he neglects the fact that Lincoln did see and was sympathetic to the moral concerns of slavery. The best example of Lincoln's sensitivity to the moral dimension of slavery, I feel, comes from his debates with Stephen Douglas in the Illinois Senate race of 1858. These debates must be read as a whole to capture their tone; many short passages can be quoted out of context to paint Lincoln as either a blatant racist or as a plaster saint; read as a whole, they paint the picture of a man who, while neither an abolitionist nor a crusading social reformer, was deeply concerned with the basic moral injustice of slavery. Again, while not calling for abolition, Lincoln separated himself from Douglas on one crucial point: Lincoln saw the slave as a human being, perhaps not deserving citizenship, perhaps inferior to the white race, certainly not his social equal, but a human being nonetheless. Douglas saw him as merely a piece of property, property whose peculiar nature was becoming a nuisance and an impediment to the nation's real business. Forgie's analysis of Lincoln's thinking on slavery omits this dimension of Lincoln's concern. Therefore, I believe this dimension of Lincoln's understanding of the moral dimension of slavery argues well for the secession theory over Forgie's theory; that is, Lincoln's legal rationalizations about slavery were not based solely on the idea that slavery was merely a part of a tyrannical conspiracy. I believe that, given the depth of his belief that the Negro, with all his shortcomings,

was a human being, Lincoln's legal justifications for slavery must have been very painful for him indeed. And it was a pain he remembered in 1865 when he, according to the reasoning of this chapter, he acknowledged the importance of the moral aspect of slavery. Therefore, I believe that interpreting his "conversion" in 1865 as a mere cynical shifting of the blame for the war to God to help him deal with his own guilty conscience does not do Lincoln's realization of the humanity of the slave justice.

The reasoning behind the second objection I have to Forgie's theory is covered in note (30); *viz.*, that Forgie implies that Lincoln was indicting only the founding fathers when he said; "Woe to them by wham the offense cometh." I believe that he was also indicting his own generation. The reasoning behind this assertion is covered in the above-mentioned note; however, the importance of this question to the comparative accuracy of both Forgie's and this thesis' theories is such that it must be repeated here. Forgie's theory that Lincoln was projecting the responsibility for the Civil War onto God (since God was causing the country to sacrifice for the sins of the fathers) suffers if one realizes that Lincoln was spreading that guilt equally among the fathers and sons. In other words, if one uses the psychological defense mechanism of projection to ease one's guilt, one does not project that responsibility onto oneself. Lincoln's inclusion of his generation (and, by implication, himself) in the responsibility for bringing on the "woe" due the nation because of slavery weakens Forgie's argument of projection and strengthen's this thesis' argument that the "conversion" of 1865 was indeed a heartfelt realization of the missed importance of dealing with the moral dimension of slavery.

The third and final objection I have to Forgie's theory is that it completely disregards the South. Forgie defines Lincoln's understanding of someone who would attempt to gain immortality by destroying the Union as one who would act to establish tyranny throughout the land, not as someone who would effect a secession movement. Yet, if Forgie is entirely correct, then southerners, as sectional passions flared, should have been extremely eager to secede from the

Union, and gain their immortality by setting up a new nation. Certainly ambition was not confined exclusively above the Mason-Dixon line. Yet, as late as February of 1860, Jefferson Davis was sounding anything like a revolutionary: "I am not of those who insist upon a southern man for the first office (the presidency) ... if assured that a northern man would have a better prospect of success, entertain no prejudice or sectional pride which would influence my conclusion." (Davis to John R. Pease, February 10, 1860, contained in Crist, Lynda Lasswell, (ed.), *The Papers of Jefferson Davis, Volume 6, 1856-1860,* Louisiana State University Press, Baton Rouge, LA, 1989.) Two months later, Davis sent a letter to the Democratic convention listing his five top candidates for president; three of these men (Franklin Pierce of New Hampshire, Daniel S. Dickson of New York, and George M. Dallas of Pennsylvania) were northerners. Certainly this does not sound like a man agitating for sectional secession. It cannot be doubted that there were some men in the South that had long agitated for secession, but it can also be argued that they were a clear minority of the population. (See, for example, Craven, Avery O., *The Growth of Southern Nationalism, 1848-1861, op. cit.*, pp. 105, 125-127, 129-130, 132, for readings on the strength of the Union party in Georgia, Alabama, and Mississippi in the 1850s.) If Forgie's assertion that men were looking for immortality through destruction of the Union (as Lincoln believed) is true, then why did secession take a decade from the Compromise of 1850 to the Civil War? Union sentiment among most citizens, both North and South, must have been strong.

In conclusion, I believe that understanding Forgie's theory on the psychological implications of Lincoln's era is indispensable in obtaining a complete understanding of the period 1848-1861. However, I do not believe that it is a full explanation of the forces which drove the nation to Civil War in the first year of Lincoln's administration. The secession theory proposed in this paper complements Forgie's theory well, and, in the three areas examined above, I believe it contains an understanding of the forces that moved the country to war that is somewhat more correct.

X. SOVIET POLITICAL DEMOCRATIZATION AND U.S. POLICY OPTIONS

A. INTRODUCTION

The purpose of the first two sections of this thesis was to attempt to prove the validity of the secession theory postulated in the introduction; *viz.*, the requirement for three mutually exclusive and independent elements to be present simultaneously for a section of a nation to effect a successful secession movement: 1) the existence of factions divided over a question of fundamental importance; 2) a characteristic of the factional dispute mentioned in the first element which makes the dispute particularly unsatiable for adjudication within the existing national governmental structure; and 3) the existence, within the national governmental structure, of subordinate governmental infrastructures which represent the interests of the minority faction. In the first section, it was argued that, in the case of the southern secession movement in the United States, it was the states-rights faction which fulfilled the first element of the theory; and in the second section it was argued that it was the moral dimension of the slavery question which fulfilled the second. Coupling these two elements with the pre@sting state governments of the South, (which fulfilled the requirements of the third element of the theory), the secession movement of 1860-1861 and subsequent Civil War were inevitable.

Having set out to examine in the first two sections the validity of the secession theory, and assuming the validity of the theory for the purpose of creating a framework in which to examine contemporary secession crises, let us now shift the focus of the thesis as it enters the third section to the question of present-day United States policy; as this nation confronts a Soviet secession problem looming on the horizon, let us use the secession theory as the rubric or paradigm in which the problem can be placed so as to facilitate this nation's response to that problem. In other words, the same secession theory whose validity was explored in the first two sections as it

related to the southern secession movement of the nineteenth century can be used to analyze this contemporary policy problem. The last two sections of this thesis will explore this question, utilizing the framework of the secession theory outlined above. This chapter, comprising the third section of the thesis, will narrow the initial focus to the first element of the secession theory: given the potential for the democratization[1] within the Soviet Union, and given the fact that this new political policy will lead to factionalization within the Soviet body politic, what are the resulting implications for United States policy? Or, put in terms of the secession theory: what policy can the United States adopt which can have an impact upon the growing factionalization of the Soviet political system?

B. METHODOLOGY USED

This chapter will utilize the theories of government developed by two English philosophers who had a tremendous impact on the formation of not only the American government but also the American psyche: Thomas Hobbes and John Locke; the writings of these two philosophers will be examined with an eye toward understanding and developing their dual, conflicting taxonomies involving the concepts of liberty, justice, and societal order[2]. Having developed these taxonomies, then, the chapter will proceed to examine the applicability of these taxonomies regarding American interests from both a domestic and international viewpoint. Finally, the question of the policies the United States should adopt towards the emerging factionalization in the Soviet Union will be addressed within the frameworks of both the secession theory's first element and the dual taxonomies presented for use from the analysis of Locke and Hobbes. In other words, initially approaching the question from the direction of the secession theory's first element, one must assume that the factions resulting from the emerging democratization of the Soviet Union will provide the necessary first condition required for any Soviet republic to effect a successful secession movement. Having made this initial assumption, then, that democratization leads to factionalization and that factionalization is an indispensable element of secession, one must

subsequently approach the problem from the direction of the taxonomies of Locke and Hobbes to answer the questions: 1) what actions will American policy makers be predisposed to take regarding the emergence of democratization within the Soviet Union; 2) what actions will more accurately reflect the national interest regarding Soviet secession; and, most importantly, 3) is it possible that the actions described in the two questions above might be mutually exclusive? These are the three questions that this chapter will explore.

C. JOHN LOCKE: EQUITABLE CONSTITUTIONALISM--THE ESTABLISHMENT OF LIBERTY AS THE PREREQUISITE TO ORDER

The interpretation of Locke's theory of government which best illustrates Locke's understanding of the relationship between liberty, justice, and order is the interpretation given by Peter Charles Hoffer's book *The Law's Conscience: Equitable Constitutionalism in America.* In this interpretation, Locke viewed the possession of political power, whether vested in a single sovereign or a legislative body, as a trust, with the trustee being the holder of the legal "title" of sovereignty (the king or parliament) and the people being both the settlor and the beneficiary of the trust. This comparison of the governmental power exercised by a sovereign to a trust rather than a contract (as was also popular with political theorists) is significant in that the remedy for a breach of contract was merely the awarding of damages in an action at law, whereas the abuse of a trust involved a suit in equity, with the chancellor's broad discretion to dissolve the trust if it acted to the detriment of the beneficiary. With the adoption of the theory of a revocable trust, Locke developed the theory even further; the chancellor (the official which heard the equitable claims in the King's court) was no longer required to act to dissolve the trust; it could be dissolved directly by beneficiaries, the people who suffered under the operation of their trustee. With this "trust" theory of government, the people could always remove the trustee when he acted contrary to the terms of the trust: "...who shall be the judge whether his trustee ... acts well, and

according to the trust reposed in him, but he who deputes him, and must, by having deputed him, have still a power to discard him, when he fails in his trust?"[3]

In this theory, then, one can discern the taxonomy developed by Locke concerning the relationship between liberty and order. The interpretation of Locke's writings given in chapter one of this thesis indicate that Locke saw government as an institution formed by citizens of a commonwealth so they could more safely and securely enjoy the rights of life, liberty, and property which the nature of man rendered insecure in the state of nature. In Locke's taxonomy, therefore, the protection of the liberty which each citizen carried with him undiminished from the state of nature to the societal state was the sole reason for the formation of the "trust" relationship which developed between the citizens of the commonwealth and those to whom political power had been delegated. The existence, nurturing, and protection of these natural rights was the trust exercised by the trustee (the king) for the benefit of the people.

If this protection was afforded by the trustee to the rights of the beneficiaries, then the trustee was effectively carrying out the duties of the trust, and no cause, therefore, could be given for the trustee's removal. In other words, order, a characteristic of society important for the orderly and predictable enjoyment of liberty, was the natural result of a society in which the protection of liberty (the careful and faithful management of the public trust) was accorded paramount importance. In Locke's society, order naturally flowed from, and was the result of, the establishment and protection of liberty. The establishment and protection of liberty, therefore, was the prerequisite of, and initial condition for, the existence of order in society. Order did not have to be imposed by the sovereign; it was the natural outgrowth of the protection of liberty. As long as the sovereign did not abuse the public trust, no revolution would be raised against him. In Hoffer's words, this trustee theory of Locke found more adherents in America than it did in England: One of the greatest ironies of Anglo-American political theory is that ... the commonwealthmen's ideas found a wider audience in Britain's North American colonies than they had in the mother country ... The strength of the trusteeship theory developed in England and

shipped to America was that its basic language was so commonplace and well rehearsed that it needed no special pleading to gain adherence." However, this theory of Locke was not received by the colonies fully developed; it lacked the substance that the particular experience of American democracy would give it: "...the gift of the commonwealthmen's idea of trusteeship to the Americans was a gift of terminology; persuasive but limited, it could confirm, support, or broaden, but not authorize any particular system of accountability in the increasingly restive colonies." Yet, this notion of trusteeship did grow throughout the nation as it matured after the Revolution: "Instead, the Americans had to duplicate the English experience with equity ... before they could fully utilize the conception of political accountability. In fact, this is what happened.[4] In other words, this notion of government as trustee, introduced by Locke and transported to America, has indeed matured as the nation has matured. This theory of trusteeship, and its implied taxonomy of the establishment and protection of liberty as a prerequisite to order, has taken firm root throughout the process of the political development of the nation.

D. THOMAS HOBBES: THE ESTABLISHMENT OF ORDER AS THE PREREQUISITE OF JUSTICE

Standing well apart from the optimism of John Locke, who saw in man the innate ability to form a just relationship between himself and his government modeled on the legal concept of the trust, was the dour, stark pessimism of Thomas Hobbes. Locke's language is often interpreted as justification for revolution; that is but a partial understanding of what Locke had to say, for the ultimate motivation of the revolution for which Locke called was a philosophy which recognized the good of man and which called for the formation of a government which could best secure for him the blessings of liberty and justice. Hobbes provides an interesting counterpoint to Locke in that he disagreed with him not on some point peripheral to Locke's main thesis, but rather on the very assumption which is his foundation for his theory. This difference of opinion leads Hobbes to postulate that the ends of government are not, as Locke was to write almost a

century later, liberty and justice; the only ends which justified government were the establishment and maintenance of order in the society. Yet, the purpose for this establishment of order was not tyranny for the sake of tyranny; rather, Hobbes saw this order as the characteristic of the society from which would flow justice. "For the laws of ... justice, equity, modesty, (and) mercy ..., without the terror of some power to cause them to be observed, are contrary to our natural passions ... And covenants without the sword are but words, and (are) of no strength to secure a man at all."[5] So spoke Thomas Hobbes about the nature of man. And from this basic philosophical assumption of the human condition, it is but a short chain of logic to Hobbes' theory of government. To Hobbes, who saw in the passions and greed of man the seeds of disorder and anarchy, there was one, and only one solution:

> The only way (is) to erect ... a common power as may be able to defend them from the invasion of foreigners and the injuries of one another, and thereby secure them ... (that) they might ... live contentedly, is to confer all their power and strength on one man ... that might reduce all their will unto one will ... This is the generation of that great Leviathan to which we owe to that immortal God our peace and defense. For by this authority, given to him by every particular man in the commonwealth, he hath the use of so much power and strength conferred upon him, that by terror thereof he is enabled to perform the will of them all...[6]

Again, the philosophical difference between Hobbes and Locke is made plain.

The consequences that follow in society when this overwhelming sovereign power is absent are anarchy, constant fear, and death: "...men have no pleasure, but on the contrary a great deal of grief, in keeping company where there is no power to overawe them all ... it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war ... to this war of every man against every man, this also is consequent: that nothing can be unjust. Where there is no common power, there is no law; where no law, no injustice ... the passion that inclines men to peace (is) fear of death..."[7] Thus, paradoxically, man relies upon the exercise of a potentially unjust and tyrannical sovereign in order to formulate the concepts of justice and liberty. In other words, these concepts flow from a state of order enforced by terror; this is exactly opposite from Locke, who would see the benefit

of governmental stability (and, therefore, order in society) as a direct function of the degree to which the concepts of justice and liberty were allowed to develop; in other words, for Hobbes, order was the mans to the end of justice; for Locke, justice and liberty were the means, and order was the end. Therefore, Hobbes naturally concentrated, in expounding on his philosophy, on the requirement for the maintenance of order.

Thus, the taxonomy of Hobbes regarding liberty, justice, and order is the exact opposite of the taxonomy of Locke; that is, whereas Locke saw liberty and justice as the prerequisite from which flowed order, Hobbes saw societal order as the prerequisite from which flowed justice. Having developed these two mirror image taxonomies, let us now proceed to examine the effect our understanding of these two separate taxonomies as a nation can have on our understanding of the democratization (and subsequent factionalization) of the contemporary Soviet government.

E. JUSTIFICATION AND MOTIVATION FOR U.S. FOREIGN POLICY--1913-1921, 1946-1989, AND THE FUTURE

Having made the distinction between the taxonomies of Locke and Hobbes in the above two sections, let us now turn towards the use of those models to describe patterns in U.S foreign policy in the twentieth century--patterns, not incidentally, which have a direct bearing on the posture the United States will take regarding the imminent Soviet secession crisis. Prior to placing the history of U.S foreign policy in the above mentioned timeframes into the framework of the above-defined taxonomies, let us first draw an important distinction between the concepts of a) motivation behind U.S foreign policy and b) justification for U.S foreign policy. The former refers to the underlying goal of the policy; the latter refers to the declared rationale behind the policy: the rhetoric used to justify the action taken. By examining the periods mentioned above, and by classifying the motivations and justifications of U.S. policy during those periods as either Hobbesian or Lockeian using the logic of the taxonomies developed previously, one can discover two important trends: 1) the degree to which the U.S was motivated by a desire either to maintain

international order to ensure international justice (the Hobbesian approach) or promote international democracy to ensure international order (the Lockeian approach); and 2) the degree to which there has been a disconnect between the motivation and justification for U.S policy. In other words, when the United States has chosen the Hobbesian approach, has it been so uncomfortable doing so, in light of its awn domestic emphasis on the importance of liberty and democracy, that it has felt compelled to justify such an approach with an obfuscating cloud of Lockeian rhetoric? And, furthermore, if this disconnect does occur, will it eventually doom the affected policy to an inescapable labyrinth of confusion and contradiction? And, finally, having covered these preliminary considerations, the following question will be explored: if the United States feels that the democratization of the Soviet Union, and the attendant danger of secession that, according to the secession theory, such factionalization will bring is not in the best interests of the United States, how should such an anti-democratic stance be justified?

F. LOCKEIAN MOTIVATION AND JUSTIFICATION–1913-1921

In can be argued with same historical accuracy that the Civil War was a conflict between the Hobbesian Lincoln, attempting to restore order throughout the country by force of arms, and the Lockeian South, attempting to struggle for the liberty and freedom of self-determination.[8] If that were actually the case, it could also be said that what the Hobbesian North accomplished on the battlefield in 1865 was merely a transient victory, and a victory, moreover, which did not transfer itself into the collective mind of the people; by the dawn of the twentieth century, it can be argued, the United States was firmly committed to Lockeian principles both domestically and politically.[9] With the elevation of Woodrow Wilson to the presidency in the election of 1912, the fusion of Lockeian ideals of international relations and governmental policy was effected. Thus, the period between 1913-1921 can be classified as a period in which Lockeian motivation for U.S. policy coincided with a Lockeian justification for that policy.

Two examples illustrate the point. The first is Wilson's dealings with Mexico.[10] As the administration of Wilson's predecessor, William Howard Taft, drew to a close, the president of Mexico, the reformist Francisco Madero, was murdered in a coup d'etat led by his chief military advisor, Victoriano Huerta. Although U.S precedent dictated that Huerta's government, regardless of its path to power, should be recognized, Wilson stubbornly refused. On March 11, 1913, Wilson proclaimed a new policy on U.S. recognition procedure as it applied to Latin America. Governments would be recognized, Wilson declared, when "supported at every turn by the orderly process of just government based upon law, not upon arbitrary or irregular force. We hold, as I am sure all thoughtful leaders of republican government hold, that just government rests always upon the consent of the governed." The next sentence seems to have been drawn directly from the Lockeian taxonomy developed above: "There can be no freedom without order based upon law and upon the public conscience and approval." In other words, upon the establishment of law, and upon the sanction on the government by the people of the nation, order to society would emerge. Wilson's espousing of this Lockeian precept in his quarrel with Mexico indicates that the concepts explored above in the development of Locke's taxonomy indicates the strength of the convictions that Wilson had for these concepts when formulating U.S foreign policy. In other words, Wilson's admiration for the precepts of Locke, precepts which formed the basis for the American government, drove him to insist that other nations adopt these same precepts for their government. The fact that he based the recognition of foreign countries on the degree to which they were to implement these precepts in their government indicated that he wanted to raise the concepts of Locke, so critical to the development of the U.S. domestic emphasis on civil liberty and political freedom, to an international scale. In other words, once these countries adopted these precepts themselves, order in the society of these countries would emerge; then, from this domestic order, an orderly and just international system would flourish. Wilson's policy in Mexico indicates the extent to which Wilson was willing to go to impose this belief on foreign nations. By 1914, the U.S. and Mexico were on the verge of war; an American

attack on the port city of Vera Cruz during that year killed over one hundred Mexicans. War was averted by mediation (led by the so-called ABC powers: Argentina, Brazil, and Chile); but the incident stands as a sterling example of Wilson's adoption of both a Lockeian motivation and justification for U.S. foreign policy. That Wilson was willing to force democracy upon the Mexicans by force of arms seems inconsistent with his Lockeian principles, this willingness to go to that extreme indicates the firmness with which Wilson held those principles.

The second example of the Wilsonian consistency between motivation and justification was his participation in the peace process which ended the first World War. Wilson's fourteen points for peace were delivered in an address to Congress on January 8, 1919; it is perhaps the clearest statement by an American president of the vision of an international system based on a Lockeian system; one based on adherence to principles of international law, from which adherence would flow international order and peace. Wilson first addressed the issue which had brought the United States into the war: "We entered this war because violations of right had occurred which touched us to the quick and made the life of our own people impossible unless they were corrected and the world secured once for all against their recurrence ... (We demand) that the world be made fit and safe to live in..."[11] Wilson was quick to point out how this could be done; he continued his demands: "... that (the world) be made safe for every peace-loving nation which, like our own, wishes to live its own life, determine its own institutions, be assured of justice and fair dealings by the other peoples of the world, as against force and selfish aggression."[12] The fourteen points plan was the mechanism through which this world of Lockeian liberty was to be obtained; the points resonate with the themes of liberty, democracy, and justice.

> Free, open-minded, and absolutely impartial adjustment of all colonial claims, based on the strict observance of the principle that in determining such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the Government whose title is to be determined ... (Point 5). ... the settlement of all questions affecting Russia ... (to obtain) for her an unhampered and unembarrassed opportunity for the independent determination of her own political development and national policy ... (Point 6). A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality. (Point 9).

Points ten, eleven, twelve, and thirteen all dealt with the assurance of autonomy for the varying nationalities in the fragmenting Hapsburg and Ottoman empires.[13] All of these points, calling for national autonomy in the emerging new face of Europe in 1918, dealt directly with the Lockeian concern for the spread of democracy throughout the old empires of Europe.

Next, this Lockeian vision, heretofore confined to the domestic scene, was raised to the international level; if this program were implemented, the Lockeian vision of order and stability growing out of the establishment of liberty and democracy would transplant itself to the word order:

> An evident principle runs through the whole program I have outlined. It is the principle of justice to all peoples and nationalities, and their right to live on equal terms and safety with one another ... Unless this principle be made its foundation, no part of the structure of international justice can stand. The moral climax of this, the ... final war for human liberty, has come...[14]

The Lockeian theme here is evident: through the establishment of national liberty will come international respect for the principles of international law and justice. Through this international respect for law will come peace and international order.

Thus, Woodrow Wilson, by his actions both in Mexico and in Europe, displayed a remarkable sense of consistency. Regardless of whether his policies are adjudged successes or failures, his consistent matching of Lockeian motivation and justification produced an intellectual honesty about his approach, an approach which, if it suffered from idealism and naivete, was strengthened by Wilson's resolute stand for principle. His proposal was greeted with skepticism by the other allies; war-exhausted and bled white, they were more interested in ensuring their own security than in listening to an idealistic American president, the leader of a nation who had lost only slightly more men in the entire war than France did at the Battle of Verdun. Georges Clemenceau, the premiere of France, pronounced the epitaph for the policy at Versailles: "God gave us the Ten Commandments, and we broke them. Wilson gave us his fourteen points - we shall see." Clemanceau proved to be prophetic; the blueprint for peace drawn up at Versailles proved to provide a less-than-lasting peace. Perhaps the failure of the allies to implement Wilson's

plan ensured its place in history. Never exposed to the possibility of failure, seemingly vindicated by the subsequent events in Europe, Wilson's plan stands today as a clear example of the idea that the ideas of Locke raised to an international scale would promote peace and international order. In addition to this, however, Wilson's plan stands today as the culmination of a presidential career in which the consistency between motivation and justification for foreign policy was maintained. This clarity of purpose cleared the way for honest debate on the goals and designs of policy; in our pluralistic society, and in our governmental system which emphasizes the importance of the legislative body, this clarity of purpose and honesty in justification is essential; they are the prerequisite for a legitimate and useful debate on national purpose. Whether they agreed with Wilson or not, the senators who debated (and eventually rejected) the treaty owe Wilson a great debt, in that his matching of justification and motivation cleared the way for a clear, open, and honest nation debate on the role the United States should have played in the new world that was emerging in 1919. As we shall see in the next section, this consistency between motivation and justification would be lacking in the next period discussed; this disconnect, while not initially, critical, eventually compromised the nation's policy in that open and honest nation debate on the goals and ends of the policy was made more difficult.

G. HOBBESIAN MOTIVATION AND LOCKEIAN JUSTIFICATION (1946-1989)

The post World War II period saw the emergence of a policy directed toward the containment of communist expansion throughout the countries of eastern and southern Europe; this policy, appropriately named "containment," found its most clear expression in the explanation given by George Kennan writing in "Foreign Affairs," in July of 1947: "The Soviet pressure against the free institutions of the western world is something that can be contained by the adroit and vigilant application of counterforce at a series of constantly shifting geographic and political points, corresponding to the shifts and maneuvers of Soviet policy." There was, essentially, a Hobbesian motivation for this policy: the maintenance of the status quo against Soviet expansion.

President Harry S. Truman acknowledged the importance of maintaining the world situation status quo in an address to Congress on March 12, 1947. In this speech, in which the president asked the Congress to the Greek and Turkish governments fighting communist insurgency, Truman began the pattern of masking Hobbesian motivations with Lockeian justifications, obfuscating the true purpose of the policy behind a wall of rhetoric to which he felt the Congress and the people would respond favorably. Thus, the speech contained passages such as this: "One of the primary objectives of the foreign policy of the United States is the creation of conditions in which we and other nations will be able to work out a way of life free from coercion ... totalitarian regimes imposed on free people ... undermine the foundations of international peace." This idea, the establishment of democracy throughout the world as a precondition for international peace, seemed to have come straight from the rhetorical arsenal of Woodrow Wilson; Truman then launched into a comparison between communism and democracy, providing further Lockeian concepts in justification of his policy to aid Greece and Turkey: "One way of life is based upon the will of the majority and is distinguished by free institutions ... the second way of life is based upon the will of a minority forcibly imposed upon the majority. It relies upon terror and oppression ... and the suppression of personal freedoms."[15]

Having justified his policy in such stirring Lockeian terms, however, Truman then turned to the true importance of his policy towards these two southern European countries. Note how the tone changed as he moved into this part of his speech from a Lockeian reliance upon the institution of democracy as a precursor to peace to a Hobbesian reliance upon the concept of order as the precursor to justice. It is important, I believe, to note exactly where in the body of the speech this shift occurred. Approximately three quarters through the speech, Truman set forth the policy of the United States in dealing with the problems posed by Greece and Turkey[16]; the Lockeian rhetoric, examples of which are given above, is almost exclusively confined to the area before the policy statements; therefore, if the period before the policy statement is seen as the justification for the policy, and the period of the speech after the policy statements is seen as the

explanation of the basis of the policy, then the respective positions of the rhetoric referenced to the policy statements provides an excellent example of the dichotomy between the justification and motivation for containment alluded to in this section.

Immediately after the declaration of his policy, the president proceeded to explain his Hobbesian motivation: "The world is not static, and the status quo is not sacred. But we cannot allow changes in the status quo in violation of the charter of the United Nations by such methods as coercion, or by such subterfuges as political infiltration."[17] In addition, Americans needed not look to political or philosophical theoretical reasoning to understand why the president was undertaking this policy; an atlas would suffice: "It is necessary only to glance at a map to realize that the survival and integrity of the Greek nation are of grave importance in a much wider situation. If Greece should fall under the control of an armed minority, ... (c)onfusion and disorder might well spread throughout the Middle East." The protection of Greece, moreover, was not just important to the stability of the Middle East; the threat to Hobbesian order might just spread on a continental scale: "...the disappearance of Greece as an independent state would have a profound effect on those countries in Europe whose peoples are struggling ... to maintain their freedoms and independence ..."[18] Finally, the threat to order was portrayed as worldwide in scope; in addition, it was now up to the United States to assume the role of maintaining order in the face of the British retreat from the world stage: "... Great responsibilities have been placed upon us by the swift movements of events ... The British government has informed us that ... that it can no longer extend financial or economic aid to Turkey ... If we falter in our leadership, we may endanger the peace of the world ..."[19] Thus, having presented the justification for the policy of aid to Greece and Turkey under a Lockeian taxonomy (*i.e.*, democracy will ensure international order and peace), Truman then explained the underlying motivation for the policy under the Hobbesian rubric (*i.e.*, international order will ensure justice and peace). Clearly, in the passages cited above, Truman was announcing a fundamental shift in U.S foreign policy: 1) the United States would

assume from Great Britain the role of "international policeman"; 2) the basis of this policy, Lockeian justifications aside, was the maintenance of international order; and 3) on the effectiveness of United States leadership in executing this "Truman Doctrine" would hinge nothing less than the future of both the United States and the world. That the policy had the Hobbesian motivation attributed to it here is shown by the fact that Truman framed the threat to the United States in terms of a crisis in world order; clearly, it is from that direction that Truman perceived the threat to the United States national interests. That Truman was sensitive to the fact that the Congress and the nation responded well to Lockeian justifications for policies in demonstrated by the fact that fully three quarters of his speech deals with these Lockeian niceties. This decoupling of justification and motivation, clearly demonstrated by this Truman speech, was a hallmark of the policy which would grow from the Truman doctrine: containment. Nor was this decoupling to end with the Truman presidency; this tendency to propose Hobbesian policies and promote them with Lockeian justifications would continue. This is not an indication that American presidents during this period were loathe to tell the truth. It is merely an indication that American public opinion responds well to Lockeian ideals.[20] Thus, having discussed the shift that occurred between Wilson and Truman, and having acknowledged the dichotomy that can exist between the justification and motivation of a policy when international order is the desired goal, let us now turn our attention to a crisis where these questions of democracy versus order take on a more critical, contemporary characteristic: the upcoming Soviet secession crisis.

H. THE SOVIET SECESSION CRISIS AND UNITED STATES RESPONSE

It is important here to review the context of the discussion of the Soviet secession movement and the points to which this chapter has been leading. First, the future Soviet secession movement is being discussed in the context of the U.S. policy response to the growth of democracy (and, hence, factionalization) in the Soviet Union. Specifically, this corresponds to the first element in the secession theory: the growth of factions. It is the contention of this chapter that

the Soviet secession movement can be influenced by United States policies directed at either encouraging or discouraging the growth of these various factions (political or ethnic) within the Soviet body politic. However, it has also been the contention of this chapter that a decision such as this is not made in a political vacuum; as discussed in the two above sections, the American people are predisposed to answer the above policy question in favor of the promotion of democracy.[21] Therefore, let us now discuss the soviet secession movement within the context of the two above-mentioned considerations.

As contained in the secession theory, the growth of factions within a nation is the first element of any secession crisis. There is no question that political factionalization is occurring; the adoption of a Declaration of Independence by the Republic of Lithuania on March 11, 1990, is but the most well-known of several challenges to Soviet federal sovereignty.[22] In addition to this divisions along ethnic lines, fissures along political fault lines are also appearing; the president of the Soviet Union has himself acknowledged this phenomenon: "I believe we will unite under a strong party with a new look, which will carry out its activities within ... a *democratic* and *pluralistic* atmosphere." At the same time (indeed, in the same speech), the president made it clear that pluralism did not extend to severing the political ties between republics and the central government. It is sentiments such as this which make it apparent that he wants to survive the secession crisis with some type of central federal sovereignty still intact. The manner in which he described the Lithuanian action indicated that he viewed secession as illegal: "This (act by Lithuania) was an adventure and a coup d'etat during a dark night."[23] Thus, the future of the factionalization of the Soviet Union hangs in an unsteady and uncertain balance between the forces of change and continuity.

The policy which the United States will develop in response to this possibility will play a major part in tipping that balance one way or the other. The policy must be framed in two separate dimensions. First, it must be framed in reference to the first element of the secession

theory. In other words, should the United States encourage democracy and factionalization? If this does become the policy of the United States, the factionalizational rate will be accelerated, bringing the country closer to a secession crisis. If, on the other hand, the United States decides that it will not be in the best interest of this nation for the Soviet Union to fragment, it should withhold its call for democratization; the resulting slowdown in political factionalization will retard the pace towards secession.

The above formula encapsulates the U.S policy options from the dimension of the secession theory. Yet, as discussed above, there is a second dimension to the problem. If the United States decides on the second policy option (*i.e.*, discouraging democracy to retard the pace towards Soviet secession), it will meet the same difficulty which met Harry Truman in 1947. In other words, the second option defined above is the Hobbesian option, in that it favors the maintenance of international order as a prerequisite for international peace. American presidents historically have proven more reluctant to choose the Hobbesian option (as witnessed by their insistence on cloaking this choice with Lockeian rhetoric), as it sacrifices the goal of encouraging democracies for the goal of international order. Thus, there is a natural sympathy in this country for the Lockeian option; a sympathy which can make it extremely difficult to pursue the Hobbesian option, even if that option is in the best interests of the country.

One of the most striking examples of the difficulty of implementing policies with Hobbesian concerns in America was the American experience with China after the Tiananemen Square massacre in June of 1989. Obviously, the president and his National Security Staff had made the Hobbesian decision that maintaining stability in its relationship with the Chinese government was more important than the immediate demand that the Chinese implement democracy; however, they did not adopt the habit of masking this decision with Lockeian rhetoric; however, the impracticability of framing their policy with Lockeian justifications did not mean that the president was comfortable with explaining his policy with a Hobbesian justification; instead, he

felt impelled to keep the entire policy secret. Knowing that his policy's focus on order at the expense of liberty and democracy would cause domestic embarrassment and an uproar in both Congress and in the country, the president's secrecy stands as a testament of America's unwillingness to face the Hobbesian motivations of its policies. In other words, this incident demonstrated the disinclination of U.S. leaders to justify their policies on terms of international order. When the ramifications of the president's China policy became known in the United States, the reaction was swift and predictable; the conservative press led the way. In just one example, William McGurn, writing in the National Review almost a year after the massacre, severely criticized the president for his continuing policy towards China, saying the president was "adrift in the China Sea."[24]

Given this propensity to chose the Lockeian option shared by the American people and the Congress, and given the tendency of presidents in the past to mask Hobbesian decisions behind obfuscating Lockeian rationales, it is extremely important to take this dimension of the problem into account when deciding if it would be in the best interests of the nation to promote democracy in the Soviet Union. If we decide that secession of various Soviet republics is in the national interest of the United States, we should address our policy towards encouraging democracy, as democracy is the initial step towards factionalization, the indispensable first element of any successful secession. If, on the other hand, we decide that it would be in the national interest of the United States that the Soviet Union survive as a political entity, then the drive toward democracy should be discouraged, by withholding recognition from seceding republics and by refusing to give them moral support in world forums such as the United nations. Notice here that in neither case is the end of our policy the establishment or disestablishment of democracy. This encouragement or discouragement of democracy is merely a tool, an intermediate concern which should be subordinated to the true goals of the policy: either 1) the elimination of the Soviet Union as a sovereign nation by the internal forces which are threatening to rend it asunder; or

2) the maintenance of the Soviet Union as a viable political entity to ensure international order is maintained and a nuclear power does not suffer fatal instability.

Just as our policy towards democracy in the Soviet Union should be directed towards the end of determining the pace and direction of the secession movements, so too should the president be honest in his justification for that policy. If the president chooses option two defined in the above paragraph, for the sake of consistency he must articulate his justification for that policy in Hobbesian terms. Let the American people know that he has chosen the Hobbesian taxonomy; let them know that international order is the virtue which he is attempting to ensure. If the policy is obscured behind a wall of Lockeian rhetoric, it will eventually have to face its inherent contradictions; this can do nothing but weaken the impact of the policy, when the impact of the policy must be strong in order to have the desired effect of maintaining the Soviet Union as a political entity. If the president chooses option one, the promotion of democracy in the Soviet Union, the justification of this Lockeian policy will dovetail nicely with the predilections of the American people. But whatever option he chooses, let him chose it within the context of the secession theory, which realizes that the emergence of democracy in the Soviet Union (and the subsequent factionalization which will be caused by this emergence) is the *sine qua non* of any successful secession movement. It is within the power of the United States to influence the secession movements of the Soviet Union by encouraging or discouraging democracy in the Soviet Union and constituent republics; let us not waste that power by basing our response to the emerging democracy in the Soviet Union m any other factor.

I. CONCLUSION

This chapter sought to make a comparison between the philosophies behind the theories of both John Locke and Thomas Hobbes. It is important within the context of a discussion about the Soviet secession movement in light of the secession theory to make the transition between the context in which Hobbes and Locke were writing (*viz.*, theories of government for single nations)

to the context of applying these theories to an individual nation's international relations. This transition can be effected by looking at the underlying rationale behind the two theories; *i.e.*, the basic pessimism that pervaded the philosophy of Hobbes and the basic optimism that, in turn, marked the philosophy of Locke. It is in this transition from domestic political theory to international relations where a nation that holds the concepts of Locke regarding the nature of man runs the dangerous risk of introducing domestic contradiction and confusion by its foreign policy. For two of the fundamental concepts of international relations, concepts enshrined in the rationale for international law, are the concepts of *sovereignty* and *order*: the concepts held so dear by Thomas Hobbes. In other words, it seems that the basic rationales upon which a system of international relations are based embraces the Hobbesian interpretation of the relationship between order and justice; that is, the former is the prerequisite for the latter. Therefore, a particular nation, in its dealings with other nations, effected as they are within an international system which places a premium reliance upon the primacy of the concepts of *order* and *sovereignty*, is working within a system which is Hobbesian in nature.[25]

This has caused a tremendous problem in the United States since the end of World War II. The root of the problem is this: we hold the philosophy of Locke, and the basic optimism that undergirds it, and the concurrent idea that it is liberty and justice which guarantee order, to be articles of faith in our national creed. Indeed, as discussed in the section on Locke and revolution, (thesis chapter III), it was the basis for our own rebellion and, as such, is the underlying rationale for our very existence as a nation. The articles of Lockean faith passed down to us by our political heritage hold such a deep sway over us that their influence is felt almost subconsciously; they comprise the engine which drives this nation, as imperfect, cynical, and lethargic as it is, towards uniquely American ideas of justice, liberty, and equality. The idea that the ideas of Locke were correct, and the concurrent idea that our government is the one that has put those ideas into their purest expression, has been an extremely powerful force in shaping our national character. It is

accurate to say that these ideals have been an extremely important factor in our nation's dealings with the other nations of the world--from the manifest destiny of the nineteenth century through the policies of the twentieth.

This chapter developed an analysis of different periods of American twentieth century foreign using the concepts of *justification* and *motivation*. If a distinction is made between these two dimensions of policy, I believe that one can discern two separate eras in United States foreign policy history in the twentieth century; furthermore, I believe one can discern a new era emerging. The first era was 1916-1920, when the justification and motivation of Wilson's foreign policy were both Lockean (that is, they placed the premium reliance upon the concept and implementation of international liberty and justice as the prerequisite for international order); the second era was 1947-1989, when there was a disconnect between the motivation and the justification. The latter was Lockean (that is, the establishment and protection of democracy as the necessary step towards developing the world order), while the former was Hobbesian (a strict premium placed on world order as the necessary element of the policy, with justice and liberty taking a subordinate role). With a seeming thaw in East-West relations, and the subsequent de-emphasizing of the policies which marked the post-war era, a third era of foreign policy is emerging. One of the first events this new policy will have to deal with is a Soviet secession crisis.

The main purposes of this chapter is to argue that the Soviet secession crisis must be dealt with from two different but interrelated dimensions: first, the factionalization element of the secession theory; and second, the external political factors, born of our nation's proclivity to accept only Lockeian solutions to international situations. Regardless of the president's decision on the promotion or discouragement of democracy in the Soviet Union, it must be made with the first element of the secession theory in mind; *i.e.*, the promotion of factionalization will hasten the secession crisis. Secondly, if the president decides that the disintegration of the Soviet Union would not be in the best interests of the United States, (in other words, if he determines on a

Hobbesian policy promoting order), then the disconnect of justification and motivation which occurred from 1946-1989 must not be allowed to happen again. For any foreign policy to be successful in our pluralistic nation, where the people must be convinced of the justification of that policy, this justification must be retched with the policy's motivation. If any policy is developed and justified with a disregard for this precept, (*i.e.*, if there is an inconsistency between motivation and justification), then the policy will run the risk of foundering in a political sea stormy with contradiction and confusion. In other words, as long as the justification is matched to the motivation (and it matters not whether they are both Hobbesian of Lockeian, only that they are matched), then the tension and unease that occur when these two factors are disconnected will be abated.

This question of matching justification to motivation presents a paradoxical situation to the United States based on the elements of this problem already discussed: 1) the U.S. as a nation is extremely comfortable with Lockeian-type justifications; and 2) the international system is designed with a premium placed on the Hobbesian concepts of order and sovereignty. If the United States could draw this crucial distinction between the domestic context of the theories of Locke and the Hobbesian realities of the international system, and if it could become more comfortable with considering the international system in this new context, then it would become much easier to articulate an acceptable justification for an international policy and to match that justification with the policy's motivation. That is, the United States must get comfortable with the idea of world order as a concept that could be used to make the connection between justification and motivation when a particular international situation raises the concept of world order to the forefront. This would not mean that we must subordinate liberty and justice to order in our domestic political context; nor does it mean we must sacrifice our historic commitments to human rights and democracy in a foreign context. It demands only that we understand that the international system demands a different rubric in which to operate, a rubric markedly different

from the one that is appropriate in the domestic context, and one which recognizes world order as a concept from which international justice and peace can flow. This Hobbesian taxonomy, which placed order above liberty and justice, is a foreign philosophy to most Americans, and its adoption will call for a very persuasive argument from the executive when some aspect of his foreign policy demands this approach. It is far better to be honest in the initial stages of the crisis, and meet a crisis in world order with this Hobbesian justification, than to cloud and confuse an already complicated issue with Lockean rhetoric that does not match the policy's Hobbesian purpose.

This is not to suggest that the United States should undertake some Machiavellian foreign policy that scraps the values and commitments which this nation has developed over its history. In the term "Hobbesian purpose" as used above, "Hobbesian" is not to be taken as a synonym for "evil"; "Hobbesian" means simply the recognition of international order as a laudable goal. We in the United States must realize that, occasionally, order and democracy can be on opposing sides of the question. This may be the very situation which a Soviet secession crisis presents to this nation.

American can, and must, stand for the establishment and maintenance of international peace and justice. It must also, if it is to remain true to its founding ideals, stand for the establishment and maintenance of domestic justice and liberty. There must, however, be a difference in approach between the means to obtaining these ends. This difference can be best understood by viewing the two process which lead to the realization of these two very different goals as two separate entities which follow diametrically opposed taxonomies. In the domestic context, we must follow the Lockeian taxonomy, where the establishment of justice and liberty are accomplished first, and societal order, whose degree of attainment is directly proportional to the degree of justice guaranteed by the government, follows second. In the international context, however, the United States may well, in a Soviet secession crisis, find that the Hobbesian taxonomy must be used. Therefore, as difficult as it is for us to accept, the spread of democracy

among the microsystems that make up the international system may remain a secondary goal; in fact, if the transformation of an individual microsystem from totalitarianism to democracy is detrimental to international order, since that order is the element from which flows the existence of international peace, then that transformation from totalitarianism to democracy should be opposed. We have already witnessed the difficulty this concept poses for most Americans in the Soviet crisis in the Baltics. There, the preservation of international order was deemed of sufficient importance, and the democratic movement of the Baltic states was deemed of sufficient danger to that order, that we firmly opposed the Declarations of Independence issued by those states, and the United States refused to recognize them. This maintenance of order, however, was greeted with dismay by most Americans who did not understand that the United States was operating under the Hobbesian taxonomy. To make matters even more confusing, the United States government continued to obfuscate the issues by clinging to the old Lockeian rhetoric of support for the promotion of democracies in other countries while its actions were deliberately at odds with Lockeian purposes. This schizophrenic response to the crisis left many Americans unsure of the justification for the president's policy. This is a further example of the absolute requirement to match Hobbesian motivations with Hobbesian justifications if a foreign policy is to be understood, much less accepted, by the American people. This situation must not be repeated in the next chapter of the Soviet secession crisis. The move towards democracy must be understood in the context of the secession theory, and the response to that move should be dictated by a policy in which the motivation and justification for that policy are matched. By ensuring that these two dimensions of the policy are understood, the United States will develop a response which 1) is in the best interests of the country; and 2) will not be sabotaged by contradiction and confusion.

CHAPTER X ENDNOTES

1. By the term "democracy" used in reference to the Soviet Union in this chapter, I do not mean to imply that any type of functional parliamentary democracy is ready to emerge in that nation. What I am referring to is the allowance of factionalization within the body politic of the Soviet Union along both political and nationalistic lines. The rise of democracy can be associated with the rise of faction; as critical issues are debated openly, factions around those issues will develop. This phenomenon was recognized by James Madison; his reasoning behind this belief, expounded upon in *Federalist #10,* was covered in this thesis in an earlier chapter. This allowance of free debate is perhaps reflected more accurately in the Soviet context in terms of "glasnost" rather than in terms of "democracy." For an interesting discussion of the factionalization potential of glasnost, and this factionalization's detrimental effect on the ability of governments to efficiently implement reform, see Kondracke, Morton, writing in the November issue of "The New Republic," p. 23, in which he suggests that the introduction of glasnost as a precursor to perestroika actually may have doomed perestroika to failure. This is what I am referring to when I speak of "democracy" in the Soviet Union; not so much a governmental structure (though this too is an important factor) as the ability to espouse different policies in an open and free manner. Once the latter is allowed, factionalization can take place; it does not have to wait for the formal institutionalization of democracy. Gorbachev clearly did not intend this process of glasnost to lead to factionalization; in his first speech as General Secretary, he proclaimed: "...the more informed people are, the more actively they will support the party, its plans, and its fundamental goals." The difference between the American and Soviet perceptions of a "free press" is succinctly defined by Timothy Colton as follows: "Gorbachev's emphasis was less on the right to know than on the utility of an informed citizenry to the regime." (Both quotes above taken from Tarasulo, Isaac J., (ed.), *Gorbachev and Glasnost, Viewpoints from the Soviet Press,* Scholarly Resources, Inc., Wilmington, DE, 1989, p. xxi.). However, the augmentation of press freedom in the Soviet Union has clearly had just such a factionalizing effect.

2. Perhaps the distinction drawn here between the philosophies of John Locke and Thomas Hobbes are somewhat simplistic. Both men's major works are incredibly profound and far-reaching works of political philosophy, and to distill them into two simple taxonomies in no way does justice to the profundity of their reasoning. However, the taxonomies presented here are accurate, and they present useful rubrics under which to discuss a very real phenomenon in American political history: the predilection of Americans to support the establishment of democracies in other countries. This approach is not unique to this paper; while I have not discovered another source that breaks the theories of Locke and Hobbes into dissimilar taxonomies as I have done here, similarly simplistic interpretations of the two men's philosophies have been used to describe American political phenomenon. (See, for example, Stapleton, Laurence, *The Design of Democracy,* Oxford University Press, New York, New York, 1947, as an example in which these interpretations are made. On page seven, the author draws a direct connection between Locke and the "American heritage" of "ideas defending liberty." The same author compares Thomas Hobbes to Karl Marx in their understanding of the ultimate rationale for law: "Marx assumed, as Hobbes did, that force is the basis of law." p. 245) It goes without saying that Locke is here pictured

as the intellectual father of the ideas that define a large portion of our American heritage, whereas Hobbes is compared to a philosopher at the root of whose philosophy lies all that is anathema to the social and political convictions Americans hold. Thus, the use of Locke and Hobbes to personify the struggle between liberty and oppression is not new.

However, this understanding severely limits the utility of what Hobbes had to say, and, for the purposes of this chapter, this interpretation should be modified. Hobbes believed in justice as fervently as did Locke; the difference between Locke and Hobbes was manifested in the different paths a society had to travel to reach it. To Hobbes, it was the end, the means to which was the imposition of order. To Locke, it was a means, the end goal of which was societal and political stability. Hobbes would impose the order to obtain justice; Locke would ensure the justice (and liberty) to obtain the stable societal order. It is this difference, whether order should be maintained as a prerequisite for justice or should liberty be established as the prerequisite for justice, raised to the international scale, which will be of interest in this chapter. The reasoning by which I arrived at the development of these two taxonomies will be covered in the text of the chapter.

3. The interpretation of Locke's theory as a theory of government as equitable trust comes from Hoffer, Peter Charles, *The Law's Conscience, Equitable Constitutionalism in America,* University of North Carolina Press, Chapel Hill, NC, 1990, pp. 41-44. The quote given is from Locke's *Two Treatises on Government,* quoted in Hoffer, *op. cit.,* p. 42.

4. *Ibid.,* p. 46.

5. Hobbes, Thomas, Leviathan, contained in Burt, Edwin, A. (ed.), *The English Philosophers from Bacon to Mill, op. cit.,* p. 176.

6. *Ibid.,* pp. 176-177.

7. *Ibid.,* pp. 160-162.

8. Of course, this interpretation, especially the element concerning the Lockeian nature of the South, would hold up much better absent the element of slavery in the southern experience. Yet the Lockeian interpretation of their cause was not far from what southern leaders themselves believed about their movement. They were convinced that sovereign state actions was the only bar to governmental tyranny the kind against which Locke had written two centuries previously. Note Jefferson Davis' comparison of the southern cause with that of the Revolutionary fathers of 1776: "What is our Union? A bond of fraternity, by the mutual agreement of the sovereign states. It is to be preserved by good faith ... Otherwise we should transmit to our children the very evil under which our fathers groaned--a government hostile to the rights of the people, not resting upon their consent, trampling upon their privileges, and calling for their resistance ... let us then be encouraged to go into the conflict determined to succeed, and transmit to our children the rich inheritance we have received from our fathers unimpaired." (Davis campaign speech in Washington for the southern Democratic ticket--President: John C. Breckinridge and Vice President: Joseph Lane--on July 9, 1860, contained in Crist, Lynda Lasswell, (ed.), *The Papers of Jefferson Davis, Volume 6, 1856-1860, op. cit.,* pp. 357-360.). The conflict to which Davis was referring was the election of 1860, not the Civil War which would came less than one year later; however, note the Lockeian terminology used by Davis to illustrate the southern position. Note also his continued reference to the principles established by the "fathers"; these fathers had seen their revolution as being justified by Lockeian precepts. Therefore, the characterization of

the southern effort as Lockeian is accurate insofar as it describes how the southerners saw themselves. Again, the presence of slavery in the South must call into question the overall interpretation of the southern movement as Lockeian.

9. Such a broad, expansive statement such as this demands some clarifying qualifications. Let us examine the domestic context of this assertion first. It seems remarkable to assert that, in a country where de jure segregation reigned in the South and de facto segregation reigned in the North, where the federal courts vigorously enforced the Sherman Anti Trust Act against labor unions but were loathe to enforce it against actual economic monopolies, where the doctrine of substantive due process was used to void any state or federal regulation of economic exploitation, where at least half the population was unable to vote--that this county was "firmly committed" to Lockeian principles. However, the movement of the country in the direction of rectifying these injustices, as slow as this movement was, indicates that, at least in the area of insuring individual liberty (the "Lockeian principle" to which the passage in the text refers), the movement was in the right direction. The work of the federal courts in protecting economic liberty over personal liberty is well known; however, Supreme Court action in the realm of individual rights was not entirely one-sided. For example, in 1886, the Court issued two important judgements on individual rights: 1) *Yick Wo vs. Hopkins,* 118 U.S. 356, which held that the equal protection clause of the 14th amendment prevented discriminatory business license application procedures for aliens, and 2) *Boyd vs. United States,* 116 U.S. 616, in which the Court held that the fourth amendment provided an absolute bar on federal seizures of private papers. In the second decade of the twentieth century, the Court also held, in *Truax vs. Raich* (239 U.S. 33), the fourteenth amendment was a bar against the states' enacting of laws restricting aliens' rights to work. In 1915, almost two decades after *Plessy vs. Ferguson,* the Court struck a major blow for black voting rights when it declared that the grandfather clause in Oklahoma's literacy test law violated the fifteenth amendment. Therefore, while many political and legal rights of a majority of Americans were denied by the states and the federal government at the turn of the century, the legal situation was not as bleak as same have pictured. The cases cited above shaw that there was movement, occasioned as it was by egregious examples of denial of due process, of equal protection, or of fundamental rights secured under the Bill of Rights, towards a more Lockeian understanding of the importance of securing personal liberty. The cases cited above provided an available foundation for the bastions of civil liberty constructed by the federal courts in the twentieth century. This evolution of the protection of civil liberties against federal intrusion (and, later, state intrusion barred by the due process clause of the fourteenth amendment) indicates that the country was moving in a Lockeian direction during the period here under nation. It may have been an imperfect journey towards liberty, with significant detours along the way, and with the way littered with the dead letters of nineteenth century civil rights laws, but the destination at which the country arrived in the twentieth century indicates that the Lockeian foundation of the national character was strong. It was that foundation to which the passage in the text (that the nation was committed to Lockeian principles) referred. Justice Felix Frankfurter defined the concept of "due process" as follows: "Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment." This process was firmly grounded in the Lockeian precepts that the nation embraced early in its founding. That these precepts were embraced at the nation's founding, and that they grew to fruition in the twentieth century, indicates that the process of growth in the nineteenth century, though slowed by substantive due process and Jim Crow, did not disappear completely. In other words, the egregious examples of unfairness in the nineteenth century to the contrary notwithstanding, this

period was not marked by a complete rejection of these precepts. It is in this context that the statement in the text regarding the status of Locke's ideals in domestic political and legal contexts was made. (Cases cited in this note, their analysis, and the quote from Frankfurter are found in Witt, Elder, *The Supreme Court and Individual Rights*, Congressional Quarterly Press, Washington, D.C., 1988, pp. 1-14. Witt does not, however, see this period to which I refer in this note with nearly as much optimism as I do. Instead of seeing it as a mere slowdown along the road to a full realization of individual rights guaranteed by the Constitution's Bill of Rights and Civil War Amendments, he interprets the period as a roadblock which brought progress during this period to an almost complete standstill. In a section entitled "Frustration of the Promise," Witt states: "Almost a century would pass before the hopes explicit in the (Civil War) amendments would came to pass. In a large part, the frustration of their premises was the work of the (Supreme) Court." (Witt, *op. cit.*, p. 3). This interpretation is certainly valid, but I prefer to see the progress that was made so swiftly in the next century as an indication that the nation's Lockeian ideals were not completely dormant during this period.

The text also asserts that the nation was committed to Lockeian principles internationally. As an example of this statement, let us examine the justification given by William McKinley for the United States' decision to annex the Philippine Islands in the aftermath of the Spanish-American War. The United States stepped out on the imperialist stage as a very reluctant actor. On April 11, 1898, President William McKinley sent his war message to Congress. In the face of tremendous public pressure, the Congress, whose own pressure had forced a reluctant president to ask for war, debated the measure for eight days; finally, after eight days of debate, the Congress defined the nation's war aims: 1) Cuba must be free; 2) Spain must withdraw from the island; and, 3) the United States would not annex Cuba. Then, after more debate, it voted to declare war on April 25, 1898. This slow, deliberate action, coupled with the Teller Amendment (*i.e.*, the prohibition against annexing Cuba), argues well for the fact that the Americans were reluctant imperialists.

It was in his justification for the annexing of the Philippines, however, where McKinley demonstrated the true power of Lockeian principles upon the United States' foreign policy. It is not argued here that this was the sole reason, or even the true reason, why we annexed the islands; only that in choosing this justification, Mckinley demonstrated the hold that Lockeian principles had on the nation's international policy: "One night it came to me this way ... :1) we could not give them (the Philippines) back to Spain - that would be cowardly and dishonorable; 2) we could not turn them over to France or Germany - ... that would be bad business ... ; 3) we could not leave them to themselves-they were unfit for self government - ...; and 4) that there was nothing left for us to do but take them all, and educate the Filipinos, and uplift and civilize and Christianize them, and by God's grace do the very best we could by them, as our fellow men for wham Christ also died..." (Discussion of congressional action on McKinley's war message, and quote from Mckinley above are from linger, Irwin, et al., *The Vulnerable Years, The United States 1896-1917*, The Dryden Press, Hinsdale, Ill., 1977, pp. 51-53.). McKinley continued this Lockeian rhetoric in his later dealings with the Philippines. In December of 1898, he issued this proclamation defining America's aims in the Philippines: "(America's) paramount aim (was to) win the confidence, respect, and affection (of the Filipinos by) proving to them that the mission of the United States is one of benevolent assimilation." (McKinley quoted in Karnow, Stanley, *In Our image, America's Empire in the Philippines*, Random House, New York, New York, 1989, p. 134.). These quotes of McKinley demonstrate the degree to which the American policy at the turn of the century relied upon Lockeian justification.

10. The facts from the discussion about Mexico, and the quote in the text from Woodrow Wilson, come from Unger, *op. cit.*, pp. 171-175.

11. Quote from Wilson's address to Congress, January 8, 1918, contained in Morris, Richard B., et al., (ed.), *Great Presidential Decisions, State Papers That Changed the Course of History, From Washington to Reagan*, Richardson, Steirman, and Black, Inc., New York, New York, 1988, p. 360.

12. *Ibid.*, p. 360.

13. All fourteen points were given in the text of the speech, located in Morris, *op. cit.*, pp. 361-362.

14. *Ibid.*, p. 396.

15. *Ibid.*, p. 363.

16. President Harry S. Truman's address to Congress, March 12, 1947, contained in Morris, *op. cit.*, p. 396.

17. This policy statement alluded to in the text is reproduced here in the notes. It consisted of three parts: "I believe that it must be the policy of the United States to support peoples who are resisting attempted subjugation by armed minorities or by outside pressures. I believe that we must assist free peoples to work out their own destinies in their own way. I believe that our help should be primarily through economic and financial aid which is essential to economic stability and orderly political processes." (Truman quoted in Morris, *op. cit.*, p. 397.)

18. *Ibid.*, p. 397. Note in these sentences two hallmarks of the Hobbesian motivation attributed to this policy: 1) the fear of a "domino effect" letting loose chaos and anarchy in the Middle East and eastern Europe; and 2) the sense that the policy will only be exercised in strategically important areas. The president's allusions to the protection of democracy contained no such limiting factors as geostrategic position of the country in question; in articulating his concern for world order, however, the president gave such position prime importance. These two passages, therefore, mark another difference between the Lockeian justification and the Hobbesian motivation for the policy known as the Truman Doctrine.

19. The quotes from Truman's speech here are rendered out of order in the text of the chapter. The cement about the British came first; the comment about our leadership came last. The quotes here are also rendered out of context; in other words, Truman said them at varying times during the speech; they were rendered that way in the text to illustrate the clear fact that the United States was now assuming the mantle of "world policeman" once held by the British. The emphasis on the "us" was added to demonstrate the same point. It was now, in the mind of Truman, the job of the United States to maintain order; the job which had fallen to Britain in the nineteenth century bad now fallen to the United States. This emphasis on the fact that we were taking over from the British, and the fact that the British had placed such a high priority on the maintenance of world order for the sake of their Empire, further reinforces the interpretation of the Truman Doctrine as Hobbesian in motivation.

20. Examples of this phenomenon abound in the Cold War rhetoric of American Cold War presidents. For example, in President John F. Kennedy's inaugural address, he drew the direct line between the revolutionary fathers' Lockeian beliefs and the justification for the Cold War: "The world is very different now (from the American Revolution) ... the same revolutionary beliefs for which are forebears fought are still at issue around the globe: the belief that the rights of man come not from the barrel of a gun, but from the hand of God ... We dare not forget that we are heirs to that first revolution ... let the word go forth ... that the torch has been passed to a new generation ... (who is) unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed ... " (President John F. Kennedy's Inaugural Address, airing on the Arts and Entertainment Network, January 19, 1988.) This initial Lockeian enthusiasm was tempered, however, by events of his administration, and, four months before his death, in a speech at American University on June 10, 1963, the president sounded a Hobbesian theme: "World peace, like community peace, does nor require that each man love his neighbor; it requires only that they live together in mutual tolerance, submitting their disputes to a just and peaceful settlement ... No government or social system is so evil that its people must be considered lacking in virtue." Later in his speech, the president marked the distinction between the domestic context of our Lockeian creed and international context of our Hobbesian outlook that will be discussed later in this chapter. The president remarked on the relationship between international peace and domestic institutions, summing up the Lockeian taxonomy in one sentence: "In too many of our cities today the peace is not secure because freedom is incomplete." Thus, in the domestic context, peace (social order) follows the establishment of freedom (liberty). However, in the international context, the order is reversed: "... we shall be alert to stop (war). But we shall also do our part to build a world of peace where the weak are safe and the strong are just." Here, the Hobbesian taxonomy is made manifest; with the elimination of war (*i.e.*, the establishment of order), justice can be established in the international system. Therefore, the change in Kennedy's vision of the Cold War, from a Lockeian perspective at the outset of his administration to a Hobbesian perspective near the end of his life, demonstrates the difficulty that presidents had struggling with the task of explaining a Hobbesian policy in Lockeian terms.

21. Ironically, the struggle against communism on the domestic front gave rise to a troubling paradox: in order to wage an effective war against communism, the nation had to sanction an unprecedented governmental intrusion on individual civil liberties. This attack on individual liberty took place along several fronts, but it was along the front of the first amendment where most of the major battles were fought. One of the striking characteristics one notices when reviewing the judicial record of this battle which took place throughout the twentieth century was that most of the eloquent prose written in defense of freedom of speech was written, until very recently, in dissent; the Supreme Court, with few exceptions, was more than willing to sanction the systematic repression of the speech of party members. Prosecutions under the Smith Act of 1940, designed to impose criminal sanctions on communist party membership, and actions under the Subversive Activities Control Act, which sought to impose partial, non-criminal sanctions on communist organizations, were upheld by the Court in a number of important civil liberty cases. The rhetoric of the Supreme Court in deciding these cases demonstrates that they indeed saw communism as a threat to international order. The best example of this rhetoric was the eloquent opinion of Justice Robert Jackson in *Dennis vs. United States* (341 US 494, 1951, quoted in Kalven, Harry, *A Worthy Tradition, Freedom of Speech in America, op. cit.*, pp. 203-205. The analysis of Jackson's opinion also comes from this book cited above.). For Jackson, the danger posed by the communist party to the United States was found in its

conspiracy to overthrow the government, a conspiracy that was as sophisticated as it was patient, waiting for the right moment in which to strike. Jackson felt it absurd to require the U.S. government to protect such an organization designed for its overthrow. Jackson's logic delivered an opinion which came down hard on the side of order at the expense of liberty; in a succinct phrase describing the government's rights when confronted by a conspiracy designed to bring about its downfall, he stated: "...an individual cannot claim that the Constitution protects him in advocating or teaching overthrew of government by force or violence." (Kalven, p. 204.). Thus, the assertion in the text that the public responds well to Lockeian ideals, as evidenced by the rhetoric of justification used in the Cold War, seems to be contradicted by the fact the United States was willing to countenance a serious invasion of civil liberty to defeat the Communist conspiracy. It is ironic that the Court sanctioned the use of such a Hobbesian concept of domestic police power to "protect" our Lockeian liberties against the Communist threat.

22. On March 11, 1990, the Lithuanian nation declared its independence from the Soviet Union: "The Supreme Council of the Republic of Lithuania, expressing the will of the nation, resolves and solemnly proclaims that the execution of the sovereign power of the Lithuanian state, constrained heretofore by alien forces since 1940, is restored. The 16 February 1918 act of independence of the Supreme Council of Lithuania and the 15 May 1920 Constituent Assembly resolution on the restoration of a democratic Lithuanian State have never lost their legal force. They have full power and are the Constitutional foundation of the Lithuanian state..." The next day, March 12, nationalists in the Ukraine announced that they would press for independence. These events, in addition to the independence movements which would occur later in other Soviet republics demonstrates the political factionalization spoken of in the text. The text of the Lithuanian declaration is located in *Foreign Broadcast Information Service (FBIS) - SOV-90-049*, p. 104.

23. Gorbachev quoted in *FBIS-SOV-90-073*, p. 81. In the same speech, Gorbachev made remarks which indicate that the factionalization of the Soviet body politic referred to in this chapter is well under way: "Right now, there are signs of split in the party; some people join the party, while others withdraw from it ... it is a natural process." Obviously, as his actions subsequent to the Lithuanian Declaration of Independence showed, he was unwilling to allow this factionalization to be used as a legal foundation for the severing of the federal ties between the Republics and Moscow. However, according to the chapter, this factionalization is the first element of the secession theory which must be met to effect a secession movement. The fact that this process of factionalization has been well under way for almost three quarters of a year bodes ill for those who would try to halt a secession movement.

24. This was the title of an article by William McGurn in "National Review," August 6, 1990, vol. 42, no. 15, pp. 37-39. This article is illustrative of the American reaction to foreign policy based on Hobbesian concerns of international order and stability. Press and public reaction to the president's China policy and his non-recognition policy towards the Baltic republics was swift and negative. This is a tendency which, this chapter argues, will have to be dealt with seriously and honestly if the president chooses a Hobbesian approach to the Soviet secession movements.

25. That the international system places such a premium on the concept of international order can be best demonstrated, I believe, by noting that international law is replete with provisions which stress the importance of maintaining this order. The United Nations

charter demands that international order be maintained; Article 2 paragraph 3 of this chapter calls on all nations to settle international disputes in a manner so that "international peace and security ... are not endangered." Perhaps the most dramatic statement of the principle of international order was given by the Allied Tribunal at the Nuremberg Trials, held against German war criminals at the end of World War II. While some defendants were indicted under the "War Crimes" and "Crimes Against Humanity" provisions of Article 6 of the Nuremberg Charter, some Germans were indicted under the provision prohibiting "Crimes Against Peace," which consisted of "... planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances..." This high premium placed upon international order, and the capital sanctions meted out to those who violated it, speak volumes on the importance international law places on the preservation of order. (Citation from the U.N. charter and the wording of the Nuremberg indictment were taken from Henkin, Louis, *et. al.*, *International Law*, West Publishing Company, St. Paul, Minnesota, pp. 361, 565.)

XI. THE LEGITIMACY OF THE SOVIET POSITION IN THE REPUBLICS

A. INTRODUCTION

This section of the thesis will concern itself with the second element of the secession theory as it applies to potential Soviet secession movements. This element of the theory stated that, in order for a successful secession movement to reach fruition, there must be a factional crisis generated containing a dimension that makes the national government particularly unsuited to adjudicate the crisis. In the case of the United States, it was the moral dimension of the slavery question which fulfilled the requirements of this element; in the case of the Soviet Union, it is the question of the legitimacy of the Soviet government itself which fulfills this element. This chapter will concern itself with the paradox presented to U.S. planners by this question of legitimacy.

B. THE PARADOX OF DEMOCRACY

This "paradox of democracy" arises from the automatic association that is made between "democracy" and "legitimacy." This would lead one to believe that, in order to enhance the legitimacy of the Soviet Union in dealing with the potential secession crisis, one would have to promote the democratization of the Soviet body politic; by this mechanism of the promotion of democracy, the legitimacy of the Soviet position *vis-a-vis* the rebellious republics would be enhanced; in other words, the Soviet position would not be summarily dismissed by the republics if the Soviet national leadership could claim some type of legitimate popular mandate. However, it is exactly here where the paradox arises, for, in the preceding chapter, the dangers of democratization from a factionalization standpoint were discussed. Therefore, a policy maker is left with an insolvable dilemma: in order to enhance the legitimacy of the Soviet position in relation to the rebellious republics (*i.e.*, in order to stop the secession movements by working

through the second element of the secession theory), he must necessarily find himself promoting the democratization of the Soviet Union. By this policy, however, he is prorating the secession movement in that he is exacerbating the factionalization problem discussed in the previous chapter. In other words, if it were the intent of the planner to retard the pace of secession in the Soviet Union, he would be faced with the seemingly contradictory policies of a) inhibiting the growth and spread of democracy (to fulfill the first element of the theory), and b) enhancing the legitimacy of the Soviet position in their dealings with the republics (to meet the criterion of the second element). On the other hand, if the planner wanted to accelerate the pace of secession in the Soviet Union, a similar contradiction in policy would await him. He would have to a) promote the spread of democracy throughout the Soviet body politic (to fulfill the first element of the theory), while simultaneously b) degrading the legitimacy of the Soviet position in dealings with the republics (to meet the prerequisite of the second element). It is exactly these seeming contradictions which this chapter intends to address.

C. U.S. POLICY: RETARD THE PACE OF SECESSION--THE PARADOX SOLVED

If it is determined that it would be in the best interest of the United States for the Soviet Union to retain its present form of government (*i.e.*, if the United States bases its decision on world order concepts discussed in the previous chapter), then the paradox is solved by the very nature of the secession theory. Recall from chapter two that the secession theory consists of three elements, *all three of which* must be present for the secession movement to be successful; if the United States decides to inhibit the secession of the Baltics or some other republic, their policy need be directed at only one element of the particular case: the democratization and factionalization of the Soviet body politic. In other words, if the Soviets decide to answer any call for secession with an overwhelming display of military force, and by such mechanism forcibly repress the faction that is clamoring for secession, the United States could implement its policy simply by remaining silent in the international community about the Soviet suppression of

democracy. If this path, described in depth in the previous chapter, is the path chosen, then questions regarding the second element of the theory would never arise, for, by dealing with the crisis by precluding the formation of faction, (*i.e.*, by dealing on the level of the first element of the secession theory), the Soviets (and, by their silence, the United States) would render any questions about the second element of the theory moot. Therefore, in this instance, the fact that all three elements of the secession theory must be present solves the democratization paradox.

D. U.S. POLICY: ACCELERATE THE PACE OF SECESSION

If the United States policy in response to a Soviet Secession movement is to accelerate the pace of the movement, then, in conjunction with the promotion of democracy discussed in the preceding chapter, the legitimacy of the Soviet government's position in adjudicating the crisis with its individual republics must be attacked. It is here where the paradox of democracy influences the choices available to U.S. policy makers. Even with the legitimizing effect of an increase in democratic participation in the government, the legitimacy of the Soviet position can be attacked along two fronts: a) the illegal nature of Soviet annexations of certain territory, and b) human rights concerns.

The illegal nature of Soviet annexations of territory is highlighted by the acquisition of the Baltic states at the beginning of the Second World War. On August 23, 1939, with the signing of the Soviet-German non-aggression pact, and the secret protocol attached thereto, the Soviet and Nazi governments formally recognized a division of eastern Europe into two separate "spheres of influence." The northern border of Lithuania was considered the border between the two spheres. The western border would be in central Poland. Therefore, all the Baltic states, in addition to eastern Poland, would fall into the Soviet sphere.[1] Between June 14th and 16th, 1940, the Soviets sent in Red Army troops and set up a puppet regime in all three Baltic states; on July 14, "elections" were held for new parliaments for the three nations, and on July 21, 1940, these new parliaments met and voted to petition for admission to the USSR. Molotov's response to a

complaint on July 2nd that the new governments were illegitimate had proven to be prophetic: "...in the future, small nations will have to disappear. Your Lithuania, along with the other Baltic nations ... will have to join the glorious family of the Soviet Union." On the 3rd, 4th, and 5th of August, the Supreme Soviet passed laws admitting Lithuania, Latvia, and Estonia, respectively. The entire process of annexation, from the entry of Soviet troops until admission to the Soviet Union, had taken less than two months.[2] A similar fate had befallen other areas such as Bessarabia, Ukraine, and Byelorussia.

With the history of these republics discussed, it becomes less difficult to see how the legitimacy of the Soviet government position in these areas, even given a lessening of political controls and an emergence of more political openness, could be attacked. The people of these republics would certainly understand this approach; on September 22, 1989, a special commission of the Lithuanian supreme soviet declared the 1940 vote to join the Soviet Union invalid. Therefore, an attack on the legitimacy of the Soviet position due to the illegal nature of the annexation of many of its major republics would be a very effective mechanism for accelerating the secession crisis in light of the secession theory's second element.

The second attack on the legitimacy of the Soviet position, the human rights concerns, is a recognition of the emotional and psychological scars present in a people after 50 years of enforced terror. It is difficult to fathom the total effect of this type of system on the human psyche; any resistance to the Soviet regime, no matter how open or factionalized, will be considered, in the words of Aleksander Solzhenitsyn, "...a cry from the soul of a people who could no longer live as they have lived."[3] A list of the psychological and physical torment which the Soviet people have labored under, from the Revolution of 1917 to the terror of Stalin to the mass executions and deportations after the Second World War, would prove to be too long to list here; the conscience shudders at the fact that a people have lived under such a system for almost nine decades. A good case can be made that the Soviets, in their past mismanagement of the nation (if such a stewardship can be characterized by the term "mismanagement"), have forfeited any

right to legitimacy whatsoever in their constituent republics. Certainly, the inhabitants of those republics would agree with that assessment; any policy designed to undermine Soviet legitimacy in dealing with a secession movement would find fertile ground in the minds and hearts of those people who have borne the brunt of the Soviets' ruthless exploitation for so long with so little respite.

E. CONCLUSION

The fact that it is a question of Soviet legitimacy in dealing with the republics' secession crises that renders the adjudication of the problem by the Soviet national government particularly difficult raises a paradox for U.S. policy planners who are attempting to influence the process; that is, the first and second elements of the secession theory, the allowance of faction and the question of legitimacy, respectively, seem to be working at cross purposes. This paradox is solved in the case of wanting to retard the pace of Soviet secession by the fact that all three elements are required to effect a successful secession movement; therefore, U.S. policy can be directed towards allowing the suppression of political factionalization within the Soviet Union, thereby rendering the legitimacy question moot.

If, on the other hand, the U.S. wants to accelerate the pace of secession, the paradox comes into play, because the democratization called for by the first element of the theory could act to undergird the legitimacy of the resulting government to deal with the Crisis. However, democratization aside, the legitimacy of the Soviet position can still be attacked by questioning the legality of the annexations of the various republics specifically, and by questioning in general the legitimacy of a government with such a brutal history of terror against its own people, a terror which would seem *ipso facto* to render any heir of that government, no matter how politically pluralistic that government had became, an illegitimate ruler. Whichever path the U.S. chooses to take in influencing the Soviet secession movement, however, this second element of the secession theory, in conjunction with the first element discussed in the previous chapter, can

provide the framework in which such policies can be formulated. In other words, as the term "legitimacy" relates to the readiness with which the factions in the various secession movements are willing to trust the national government of the Soviet in having the authority to effect a just and lasting settlement of the secession crises, so our policies designed to affect the legitimacy of the Soviet position can have a tremendous effect on the final outcome of those movements.

CHAPTER XI ENDNOTES

1. Facts in this passage were taken from Heller, Mikhail, et. al., *Utopia in Power, The History of the Soviet Union from 1917 to the Present,* Summit Books, New York, New York, 1982, pp. 333-345.

2. Facts in this passage, and the quote from Molotov, are taken from Nahaylo, Bohdan, et. al., *Soviet Disunion, A History of the Nationalities Problems in the USSR,* The Free Press, New York, New York, 1990, pp. 81-94.

3. This phrase from Solzhenitsyn in contained in *The Gulag Archipelago, 1918-1956,* (abridged by Edward E. Ericson, Jr.), Harper and Row, 1973, p. 459.

XII. CONCLUSION

As the first year of the post Cold War world gives way to the second, the United States is faced with profound uncertainties about the structure of the post Cold War international system. As fledgling democracies struggle to stay aloft in countries whose economies and peoples have labored under a half-century of communist rule, as new threats emerge to divert the world's attention, and as the U.S struggles with its own economic uncertainties, the certainties and given assumptions of the international system have been revoked as if by the mere stroke of a pen. When one's environment is suddenly changed, even if that environment was somewhat dangerous, one tends to feel uncertain, hesitant, and threatened. It is only natural that, in this transition to some new international order, nations should suffer some type of anxiety.

In this new, uncertain environment, however, one prediction can be made with some legitimate degree of probability: sometime in the near future, the Soviet Union will experience a bona fide secession movement which it will not be able to suppress with the intimidation tactics employed earlier in the Baltic states. It will be in the position of the United States in 1860: fight for the Union, or let the sister republics go their separate way in peace. Political maneuvering may lengthen the period between now and the outbreak of the crisis; however, it cannot forestall it.

I doubt very seriously that I could have made the above prediction with as high a degree of probability when I first started this thesis; the Lithuanian independence movement was effectively stymied by a combination of political and military intimidation; similarly, a more violent separatist movement in the southern republics was effectively quelled. The Soviet president, having gained confidence by his suppression of these two rebellions, seemed to be a firm control of the situation.

However, today the situation is different. The economic shortages in the country are exacerbating an already explosive situation. All statistics point to the fact that life in the Soviet Union is fast becoming unbearable. An editorial in the "New Republic" (Vol. 203, No. 26, December, 1990, article entitled "Separation Anxiety," pp. 5-6) contains the following stark statements: "All the signs are that the multiple economic and political crises of the Soviet Union are rising towards some kind of crescendo in 1991 ... Fourteen of the fifteen Soviet republics have passed sovereignty declarations ... The Soviet Union, as currently constituted, is doomed..." (This editorial also has a statement linking the Soviet legitimacy in the republics to democratic elections, and I must insert the disclaimer here that I did not get that idea, of which a part of section four of this thesis is composed, from this article.) At any rate, this dissolution of the Soviet Empire seems inevitable.

It has been the purpose of this thesis to propose a theory within which policy options relating to Soviet secession could be developed and implemented. It has not been the ultimate purpose of this thesis to provide an in-depth review of American history prior to the Civil War. However, such depth was needed, I feel, to undergird the secession theory with some validity; only after the theory bad been explained in light of a relevant historical phenomenon could the theory be used with any degree of confidence to plan for contemporary secession crises. Therefore, it must be said here that it was not my intention that the importance of the sections be proportional to their length. The history sections were the longest, as they provided the validation for the theory; the policy sections were the most important, as they represent the application of historical analogy to present day planning scenarios. This, indeed, is the true value of reasoning by historical analogy.

In conclusion, it must be remarked here that the importance of this secession theory will not end upon the breakup of the Soviet Union; as the cancer of ethnic, political, and religious rivalry, held in remission by the strong medicine of Soviet military might, regains its potential to spread as Soviet military might crumbles, in both Europe and elsewhere, it is always possible that

other secession movements, the success or failure of which could bear on U.S. national security interests, may arise. The secession theory postulated in this thesis can continue to provide a framework for the formulation of policy in these later, post-Soviet secession crises. As long as there is perceived oppression in a country, and that country's political system is, for some reason, ill-equipped to adjudicate the problem, and as long as the oppressed faction has the governmental infrastructure to effect secession, this problem of impending secession will continue to occur. It was the purpose of this thesis to develop a theory to facilitate the planning that would ensure that the crisis is resolved in the best interest of the United States.

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